"STRANGERS" IN THE COURTROOM: AN EXAMINATION OF ACCESS THEORY AND THE PUBLIC'S RIGHT TO OPEN COURTS FROM *DEPASQUALE* TO *RICHMOND*

by

Geoffrey Fattah

A thesis submitted to the faculty of
The University of Utah
in partial fulfillment of the requirements for the degree of

Master of Arts

Department of Communication

The University of Utah

May 2011

The University of Utah Graduate School

STATEMENT OF THESIS APPROVAL

The thesis of **Geoffrey Fattah**

has been approved by the following supervisory committee members:

David Vergobbi	, Chair	**12/08/2010** Date Approved
Kimberley Mangun	, Member	**12/08/2010** Date Approved
Glen Feighery	, Member	**12/08/2010** Date Approved

and by **Ann Darling** , Chair of the Department of **Communication**

and by Charles A. Wight, Dean of The Graduate School.

ABSTRACT

The First Amendment to the U.S. Constitution mentions no citizen right to access government information. However, a series of U.S. Supreme Court decisions forged an implied right to access information through the First Amendment. This approach to finding new constitutional rights within the language and spirit of the Constitution shows how our fundamental rights are ever-growing and evolving to adapt to modern needs. The origins of this movement can be traced back to legal and free speech philosophers who insisted that for a democracy to function, its citizenry must be well informed. This thesis is an historic and legal analysis of the Supreme Court's finding of a right of access through *Richmond Newspapers v. Virginia*, and the one-year period before the ruling in which the *Gannett Newspapers v. DePasquale* decision caused hundreds of motions for court closures.

In 1980, justices established the press and public have a constitutional right to attend court hearings. However, courts across the nation continue to resist attempts by the public and press to attend hearings, giving little weight to their right of access. Although the U.S. Supreme Court has established that an overriding government interest must be shown to close a court hearing, many judges fail to take the right of access seriously and have chosen to accept flimsy government requests for closure. Given fractured opinions by the justices in *Richmond* this thesis has identified a need for a clear legal test to judge a right of access. This includes making court access an affirmative right, showing substantial probability of prejudicial harm for closure, considering alternatives to closure, including the right of the public to object and be heard, ensuring the narrow tailoring of

any closure order, and limiting the time span of any closure order so the public can access hearing transcripts.

Applying a clear legal test will support the constitutional rights of the public and press to access government information and give clear guidance to judges on how to handle requests for court closure. Clarifying the confusion created by multiple opinions regarding access will maintain transparency of justice and confidence in our courts.

CONTENTS

CHAPTER I

INTRODUCTION

As a cub reporter first assigned to cover courts in 1998 I knew little about our justice system. Like many people, I would expect, I was even surprised that members of the public could walk in and observe most court proceedings. Over the years as a professional journalist, I had since learned that I could access court hearings, but still had no idea what my rights were. I recall the first time a judge dismissed me from attending a court hearing. It happened so suddenly. I cannot recall if it was the defense or the prosecution, but a verbal motion was made for closure to the public, the judge quickly ruled from the bench and I was promptly asked to leave the courtroom without a chance to object. Frankly, I did not know what I could object to. I felt powerless. I lacked the knowledge that could tell me how, as a journalist or a member of the public, I fit into the justice system, if at all. It was an intellectual itch that sat in the back of my mind for a number of years.

The American courtroom has been the venue for some of the most profound and dramatic changes in our society. It is a place where the fates of lives hang in the balance or where laws are interpreted and refined. Over the years, I learned the press plays a crucial role in relaying news of case outcomes to the general public. Throughout this nation's history members of the press have become an increasingly important vehicle of news from the courtroom. Reporters have had a long tradition of observing court

proceedings, if not with trepidation by some judges and counsel. Yet, for most of our country's history, tradition has given reporters little legal ground to stand on to challenge a judge's decision to close a hearing to the public. That is, until 1980 in the landmark case of *Richmond Newspapers, Inc. v. Virginia*, in which the United States Supreme Court found a constitutional right of public access to government information under the First Amendment for the first time in our nation's history.[1] Before this ruling, the ability of the press to cover court hearings was at the whim of the trial judge and supported by tradition, not law.[2]

This thesis is the product of my personal and professional curiosity about the right of the public to access justice. What I have discovered is a remarkable story that has changed the very nature of the right of citizens to be informed. I have also discovered that the press and public do indeed play a crucial role within our system of justice; a role that goes beyond simple fancy and curiosity, but is rooted in the core of our concept of justice. Knowing the actions of government officials, having access to court proceedings and government information, has been well established as crucial for the survival of a democracy.[3]

This thesis takes an historical and legal look at the cases of *Gannett Co. v.*

---

1 *Richmond Newspapers, Inc. v. Virginia (BURGER, C.J., Opinion of the Court),* 448 *U.S.* 555 (1980).

2 Chief Justice Warren E. Burger gives a detailed description of the English and early American traditions of public court hearings in *Richmond*, which will be discussed in detail. See *Richmond*, 565-571.

3 Influential legal scholars, such as Alexander Meiklejohn and Thomas Emerson, wrote than an informed citizenry was essential in ensuring that the public had legitimate participation in a democracy. Without being well informed, a true democracy cannot function: Thomas Irwin Emerson, *Toward a General Theory of the First Amendment* (New York: Random House, 1966), 14. Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (New York: Harper Brothers Publishers, 1948), 27.

DePasquale[4] (1979), *Richmond Newspapers v. Virginia* (1980), and the one-year period between them. It also explores other cases in the years before and after that dealt with court access. Leading up to *DePasquale*, the Supreme Court was struggling with the role of the press and pretrial publicity. The *DePasquale* decision established that the public and press did not have a constitutional right of access to court proceedings, specifically pretrial hearings. One year later, the court clarified in *Richmond* that the public and press did indeed have a constitutional right to access some hearings, specifically trials. The legal turn was due in part to a rash of court closures by judges across the country. It was also driven by a profound shift in legal philosophy.

In the years prior to the *Richmond* decision, constitutional law scholars were realizing that a freedom of speech in and of itself was not enough for a functioning democracy. Great legal minds the likes of Thomas Emerson and Alexander Meiklejohn questioned the value of the freedom of speech and of the press if the public was not informed of what the government was doing.[5]

It is clear from the language of the First Amendment of the U.S. Constitution that the government shall not infringe upon the open discussion of government matters by the press, or citizens.[6] Over years and generations of precedent, the U.S. Supreme Court has refined the First Amendment to mean that open criticism of the government, or

---

4 *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

5 See Note 3.

6 "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

government officials, is protected by the Constitution.[7] Yet, establishing a clear right by which citizens can educate themselves about government affairs has been much more difficult to accomplish.

Nowhere in the First Amendment does it state that citizens have a "right to know," as longtime Associated Press journalist Kent Cooper was fond of calling it.[8] While the logic of informed speech is implied, a freedom of information is not mentioned anywhere in the U.S. Constitution.

A lack of any explicit language still does not mean that such a right does not, or cannot, exist. The Bill of Rights was not written to limit rights. Numerous examples in our nation's history show that the spirit of open government was followed at times, but because of a lack of solid legislative and legal support, government was also clamped shut from the public.[9] This remarkable evolution of constitutional law is a story of

---

[7] First, the U.S. Supreme Court established that state laws are subject to constitutional review under *Gitlow v. New York,* 268 U.S. 652 (1925). It then refined that speech against the government is protected up until inciting or producing imminent lawless action in *Brandenburg v. Ohio,* 395 U.S. 444 (1969). It also set the limits in which a public official could sue the press for defamation and libel, requiring an official to prove an actual malice standard in *New York Times v. Sullivan,* 376 U.S. 254 (1964). Taken together, the High Court has set a tough standard by which the government can limit political speech.

[8] Kent Cooper, *The Right to Know: An Exposition of the Evils of News Suppression and Propaganda* (New York: Farrar, Strauss and Cudahy, 1956), 165.

[9] Congress passed the Espionage Act in 1917 amid World War I and amended it a year later. The loose wording in this act allowed for the prosecution of people who spoke against the war, thereby creating a chilling effect in citizens' ability to have their say in the direction of the war. More than 2,000 prosecutions took place. See: Thomas Tedford and Dale Herbeck, *Freedom of Speech in the United States* (State College: Strata Publishing, 2005), 46.

Secret counterintelligence programs by the FBI, CIA and U.S. Army were found to have not only spied on U.S. citizens engaged in political, civil rights, and antiwar work, but acted to ruin their lives and have them fired from their jobs from 1960 through 1970. These programs did not come to light until years later. One such FBI program attempted to turn organized crime against the American Communist Party. It was later revealed in 1975 the CIA had a 20-year file and had been reading the mail of Congresswoman Bella Abzug. See: Franklyn S. Haiman, *Freedom of Speech* (Skokie, Ill.: National Textbook Company; and New York:

struggle by journalists, lawmakers and attorneys to slowly forge a "right to know" that keeps government doors open for public scrutiny. Within this 20-year period, from 1960 to 1980, Congress passed the most comprehensive legislation outlining access to government documents in the Freedom of Information Act (FOIA), which for the first time in U.S. history presumed that all government documents are public unless stated otherwise under a list of exemptions.[10] Also during this period the U.S. Supreme Court tackled the issue of press access to court hearings in a series of rulings, and ultimately found the press has a constitutional right under the First Amendment to attend and report on criminal trials in the landmark *Richmond Newspapers v. Virginia*.[11]

Richmond was significant in recognizing that press coverage of the judicial system is a necessary part of informing the public that justice is served. In turn, an informed public maintains confidence in our justice system.

As mentioned, the year in between *Richmond* and *DePasquale* was marked by attempted court closures, an embattled press concerned with the future of open government, and Supreme Court justices struggling to rein in a carriage that got away from its driver.[12] This thesis takes a legal and historical look at these two key opinions

---

American Civil Liberties Union, 1976), 40.

The publication of the Pentagon Papers by *The New York Times* in 1971 revealed that government officials had been systematically lying to the public about actions in Vietnam and the justifications for the war. This lead to the landmark Supreme Court prior restraint case of *New York Times v. U.S.* See: *New York Times v. U.S.*, 403 U.S. 713 (1971).

[10] *The Freedom of Information Act* (FOIA), 5 U.S.C. 552.

[11] 448 U.S. 555 (1980).

[12] Although the justices never directly acknowledged that *Richmond* was a correction of any error on their part, that decision was issued one year to the date (July 2, 1980) that *DePasquale* was issued (July 2, 1979).

and their impact on the ability of the press to cover the business of courts across the nation. It analyzes Supreme Court opinions, along with derivative lower appellate court rulings to gain a clear understanding of how justices and judges have interpreted the constitution when it comes to access. It analyzes examples of intense press coverage leading up to *DePasquale*, to give a sense of the attitudes and concerns of the courts toward press behavior. It also focuses on the one-year period between *DePasquale* and *Richmond* as a time when the battle over the issue of court access reached critical mass.

This qualitative historical/legal study examines articles compiled using online database archives of national and local newspapers before 1979 up to 1980 to better understand the reaction of journalists to High Court rulings and their concerns over their ability to cover court hearings. The thesis also reviews books written on freedom of access around this time and law review articles examining the significance of the Supreme Court's decisions. The texts of the High Court's rulings are also examined in detail to gain a better understanding of the justices' reasoning and the evolution of their thinking.

While several legal and journalism scholars have written pieces about these opinions, many have overlooked the one-year period between the two rulings, the reaction judges and journalists had to *DePasquale* before *Richmond* was issued, and how quickly justices of the Supreme Court took action to clarify themselves amid a rash of court closures. This almost immediate reaction by judges during this one-year period reveals an innate bias within the judiciary culture against press presence, which still exists today in some courtrooms.

In looking at the period between *DePasquale* and *Richmond*, it is clear that

attorneys and judges across the country were quick to take advantage of the High Court's ruling and exclude the press from court hearings. Part of this is due to past poor behavior on the part of reporters, which soured court attitudes toward the press. While the *Richmond* ruling helped establish the historic and legal role of the press in the justice system, this study argues that the lack of a clear legal test in *Richmond* has allowed judges to dismiss the right of press access, even to this day.

The *Richmond* ruling was far from settled. While the justices reversed their attitude regarding constitutional access, there were seven fractured supporting opinions, five of which supported reversal of *DePasquale*, but for differing reasons. Subsequent Supreme Court rulings since *Richmond* have worked to solidify the High Court's position on access, but this author argues a clear constitutional test is still needed.

The twenty-year period leading up to *DePasquale*, and especially the one-year period between 1979 and 1980, embody the uncertainty members of the press had over the future of covering the courts and of the justices who pondered what place reporters should have in the justice system, if any. The words of the justices in both opinions, as well as newspaper articles, books and law journals, tell the story of a struggle between journalists and judges to find a place for those whom Justice Potter Stewart referred to as "strangers" in the courtroom.[13]

Chapter II explores the legal development of access theory and the methodologies applied for this study. Chapter III reviews the literature written on the subject of court access and confirms a consensus among scholars that *Richmond* was a landmark case, but shows little has been written regarding the case's historic and legal context. It also shows

---

[13] *DePasquale*, 386.

that few studies consider the one-year period between *DePasquale* and *Richmond* as a possible catalyst for *Richmond's* creation. Chapter IV reviews the case history of court access rulings leading up to *DePasquale* and *Richmond*, and the reaction by both journalists and judges. Chapter V analyzes how *Richmond* has shaped subsequent Supreme Court access rulings and how the issue of court access appears far from settled, with new methods of discouraging press presence being enacted. Chapter VI concludes this study by claiming that ensuring the future of a transparent justice system in the United States will require a clear legal test and a reaffirmation that members of the public and press have never been, nor should be, "strangers" to the court.

CHAPTER II

ORIGIN OF LEGAL ACCESS THEORY - HISTORICAL AND LEGAL METHODS, AND THEIR APPLICATIONS FOR THIS PROJECT

To better understand the crucial need for a right of access to government information within our democracy, we must understand how it was formed and for what purpose. Although a right of access cannot be found within the Constitution's amendments, its development has mainly been a late twentieth-century phenomenon within the field of legal philosophy. While neither the Supreme Court, nor Congress, has afforded equal standing of this concept alongside the constitutional right of freedom of speech for much of U.S. history, the notion has been around since before the early days of this country.

The theory of access to government information stems from the ancient tradition of free expression within democracy. John Milton's *Areopagitica* in 1644 clarified that ancient Greek philosophers espoused the importance of free expression as a way to access information and knowledge.[14] This importance of a free flow of information was further supported by John Stuart Mill in *On Liberty* in 1869: "There must be discussion, to show how experience is to be interpreted. Wrong opinions and practices gradually yield to fact and argument."[15]

---

[14] John Milton, *Areopagitica* (London, 1644), paragraphs 4, 5.

[15] John Stuart Mill, Charles W. Elliot, ed., *On Liberty*, "Of the Liberty of Thought and

James Madison, the nation's fourth president, expressed the basic need for the public to have access to information in order for the notion of self-governing to function:

> A popular government, without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives.[16]

This theory of a need for an informed public was further explored in the twentieth century (1948) by legal philosopher Alexander Meiklejohn: "The principle of the freedom of speech springs from the necessities of the program of self-government."[17] While Meiklejohn did not specifically claim that the Constitution granted a right of access, he did make it clear that access to information was important for citizens to make important and relevant decisions.[18]

Between 1973 and 1977, legal philosopher Thomas Emerson, a major architect in modern civil liberty law, was one of the first to articulate the concept of access theory:

> The public, as sovereign, must have all information available in order to instruct its servants, the government. As a general proposition, there can be no holding back of information; otherwise, ultimate decision-making by the people, to whom the function is committed, becomes impossible.[19]

Discussion" (1869; reprint, New York: Barnes & Noble, 2004), 20.

[16] James Madison, "Letter to W.T. Barry" (August 4, 1822), in Gaillard P. Hunt, ed., *The Writings of James Madison* (New York: G.P. Putnam's Sons, 1910), 103.

[17] Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (New York: Harper Brothers Publishers, 1948), 26.

[18] Ibid., 27.

[19] Thomas I. Emerson, "Colonial Intentions and Current Realities of the First Amendment," *University of Pennsylvania Law Review*, vol. 125, 737 (1977): 755.

Free speech and a right to know information, Emerson wrote, were two complementing sides that were necessary to form a complete system of the freedom of expression.[20] Emerson posited four reasons for a constitutionally-protected right to access information under the First Amendment:

- It is essential to personal self-fulfillment.
- It is necessary for seeking the truth, or at least a better answer.
- It is necessary for collective decision making in a democracy.
- It is vital for effecting social change without resorting to violence or undue coercion.[21]

If, as Meiklejohn and Emerson stated, an informed populace is necessary for the public to participate in self-governance, then it is easier to argue that a right of access to government information should be constitutionally protected and may be an implied right under the First Amendment. As such, public access to the three branches of government, including the judicial branch, is a necessary function of a democracy.

Of course, legal access theory remained just that, theory, and would not become a right of access to government information until the Supreme Court validated it as a constitutional right. This process began judicially in 1978, stumbling through the period of *DePasquale* and emerging as a clear constitutional right in 1980 with *Richmond*.

It was through the works of Meiklejohn and Emerson that we see the first real impact access theory had on the justices of the Supreme Court. In their concurring opinion to the majority in *Richmond*, Justices William J. Brennan and Thurgood Marshall

---

[20] Emerson, "The First Amendment and the Right to Know – Legal Foundations of the Right to Know," *Washington Law Quarterly* 1973, no. 1 (1976): 2.

[21] Ibid., 2.

directly cited both Meiklejohn and Emerson when they supported the notion that the First Amendment "has a structural role to play in securing and fostering our republican system of self-government," specifically when it comes to a right of access to government information.[22] Meiklejohn's notion of an informed populace was again cited by Justice John Paul Stevens in his dissent in *Houchins v. KQED* when he pointed out that, "Our system of self-government assumes the existence of an informed citizenry."[23]

The theory of access to government information was also moved beyond theory to well-established fact in both state and federal governments through the Freedom of Information Act[24] and a variety of open government, or "sunshine," laws for state records.[25] More contemporary scholars have further refined access theory. Free-speech

---

[22] *Richmond*, 588. Justices Brennan and Marshall's joint decision cites a list of cases and authors immediately after this quote. Among them, Emerson and Meiklejohn can clearly be noticed: "See *United States v. Carolene Products Co.,* 304 U.S. 144, 152-153, n. 4 (1938); *Grosjean v. American Press Co.,* 297 U.S. 233, 249-250 (1936); *Stromberg v. California,* 283 U.S. 359, 369 (1931); Brennan, *supra,* at 176-177; J. Ely, Democracy and Distrust 93-94 (1980); T. Emerson, The System of Freedom of Expression 7 (1970); A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948); Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 23 (1971)."

[23] *Houchins v. KQED* (Stevens, dissenting opinion), 438 U.S. 1 (1978): 31. Stevens' citation for this statement appears as follows: "See A. Meiklejohn, *Free Speech and Its Relation to Self-Government*, 26 (1948): 'Just so far as…. the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning, for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.*'"

[24] 5 U.S.C. 552.

[25] Florida's Government-in-the-Sunshine Law (Fla. Stat. § 286.011), passed in 1967, is one of the most liberal open records and meetings laws in the United States. California has its California Public Records Act (Gov. Code, § 6250 et seq.) and California Open Meeting Act (Gov. Code, § 54950 et seq.). Utah has its Government Records Access and Management Act (Utah Code § 63G-2-201) , and Utah Open and Public Meetings Act (Utah Code § 52-4-102). Pretty much every state now has laws regarding records access and open meetings regulations.

scholar Herbert Foerstel posited three levels of access as outlined by Supreme Court cases. The first level is the prevention of the government from suppressing views and facts about government affairs from citizens. The second level is the government's obligation to comply with demands by its citizens for information. The third, which Foerstel said has yet to be upheld by the courts, is an affirmative obligation to inform the public by making information publicly available before a request is made.[26]

Free speech philosopher Franklyn Haiman posited that, to make free speech "more than empty words," access to information by citizens is required.[27] Haiman wrote:

> If the citizens of a democracy are the rulers, and the government their servant, then it follows that those citizens must not be prevented by their government from securing and communicating the knowledge which is necessary for intelligent decision-making.[28]

Law professor Lillian R. BeVier noted that through the course of several key rulings, which will be discussed in this thesis, the U.S. Supreme Court has affirmed the premise "that the Constitution assigns affirmative value to an informed public."[29] However, BeVier remained skeptical that the rulings have imposed a constitutional duty upon the government to grant access, such as court hearings, or disclose information.[30]

Law professor C. Edwin Baker remained concerned over press organizations and

---

[26] Herbert N. Foerstel, *Freedom of Information and the Right to Know* (Westport, Conn.: Greenwood Press, 1999), 14.

[27] Haiman, *Freedom of Speech*, 42.

[28] Ibid.

[29] Lillian R. BeVier, "An Informed Public, an Informing Press: The Search for a Constitutional Principle," *California Law Review* 68, no. 3 (May, 1980): 483.

[30] Ibid. 484.

attorneys seeking a constitutionally-mandated access right.[31] Baker argued that having such a right would not protect the "integrity" of the press and worried that, if there was to be a constitutional right of access to government information, government officials would turn to destroying documents to cover up abuse.[32] Baker called for more work by the press in finessing information from government officials through unofficial channels, using political tools and the threat of public shaming.[33] This author finds Baker's position short-sighted. To assume that seeking a constitutional right of access in pursuit of an informed public is *not* something worth establishing is selling citizens short of their inherent right to participate in government. By bartering in the shadows, the press becomes little more than beggars for information and beholden to government officials as masters and gatekeepers. From Watergate to the Pentagon Papers, even to the 2010 WikiLeaks release of U.S. military and diplomatic documents, Baker's fear of destroying the evidence of wrongdoing appears to be unfounded, though some people do try. The public and press need a constitutional finding of access in order to participate in government and to also ensure that government officials are doing the will of the people.

To understand the evolution of this theory, from budding notion to full-fledged law of the land under *Richmond*'s constitutional finding of a right of access, this thesis engages historical and legal methods. Historians often see their research as the pulling together of empirical evidence to form a better understanding of past events, but that is

---

[31] C. Edwin Baker, *Human Liberty and Freedom of Speech* (New York: Oxford University Press, 1989), 237.

[32] Ibid., 238.

[33] Ibid., 239.

just the first step. The historian then asks what consequences past events have had on the present. The structure of the past is often seen as a model for the present and helps to serve as a "social memory" with which we can compare the present.[34] In this study I ask: Why in a one-year period did the U.S. Supreme Court do an apparent turn-around on its position of press access to court hearings? Why were the positions of the justices in *Richmond* so splintered, and what effect did it have on the lower courts?

To answer these questions, the evidence gathered must be verifiable primary-source accounts of what took place. In this thesis primary-source accounts are comprised of Supreme Court rulings written by the justices and published in order to explain their legal and philosophical reasoning. They also include articles and editorials written by journalists, who offered accounts of their concern for the future of transparent government and their ability to relay to the public the actions of the government. Primary sources are then supplemented with secondary-source analysis of works written by both legal and communication scholars to better inform the discussion of these questions. Great effort and care was made to ensure that key rulings and news articles on court access were identified and thoroughly reviewed. Significant effort was also taken to search through multiple publication databases to locate relevant works regarding court access in order to give a clear sense of the state of research in this field among scholars. Connections among this evidence are then made and should be apparent to readers.[35] This

---

[34] David Paul Nord and Harold L. Nelson, "The Logic of Historical Research," *Research Methods in Mass Communication* (New York: Prentice Hall, 1981), 283-285.

[35] Mary Ann Yodelis Smith, "The Method of History," *Research Methods in Mass Communication,* 2d ed. (Englewood Cliffs, N.J.: Prentice Hall, 1989), 311-317.

work's method, reasoning, and path to conclusions should not only be clear to readers, but the paths through the cited evidence leading to those conclusions should be easily followed and replicated by other scholars.

My goal is to review the historical evidence, discuss the scholarly field, and then build on past research by addressing unanswered questions that are important to understanding the value of the right of access. Historians do not claim that study of the past allows the prediction of the future, but a study of what people have done in the past can lead to insight into the possibilities to make improvements.[36] In this case, the actions of judges across the nation after *DePasquale* can clarify the need for protection of a citizen's right to court access under the law.

Because this thesis involves an inspection of the formation of the law, a legal analysis of court decisions is also helpful. In looking at the "web of relationships" among associated court cases, broader themes emerge that impact current jurisprudence and society in general.[37] By analyzing the language of legal reasoning, and *dicta*[38] we can reach a better understanding of what the High Court's justices found compelling and important in reaching their decisions. Analysis of the law is often referred to as legal argument. The law speaks through a multitude of voices, like a choir singing the same

---

[36] James D. Startt and Wm. David Sloan, *Historical Methods in Mass Communication* (Newport, Ala.: Vision Press, 2003), 10.

[37] Donald M. Gillmore and Everette E. Dennis, "Legal Research in Mass Communication," *Research Methods in Mass Communication*, 2d ed. (Englewood Cliffs, N.J.: Prentice Hall, 1989), 343.

[38] According to *Black's Law Dictionary*, dicta (plural for dictum), is a comment by a judge in a decision or ruling which is not required, but may state a legal principle as a judge understands it.

song but not all in harmony.[39] The foundation of law is based on the innate understanding of right and wrong. While the more classic form of Western law was based on certain "laws of nature," today's contemporary law rejects the notion of natural truth, but rather draws upon five sources for the formation of law and argument: texts, author intent, precedent, tradition and policy.[40] These five types of legal argument, or combination thereof, are what attorneys and judges often recognize as legitimate legal argumentation. The list of five are a progression in scope, with text being the most narrow and policy being the most broad in scope of interpretation. Text is seen as the literal reading of the word. Intent supplements text with an understanding of author's purpose. Precedent takes text and intent into the holdings and opinions of multiple courts. Tradition is the context of court opinions in how a community conducts itself. Finally, policy is the expression of the values and interest in which the law is meant to serve. In this thesis, I consider the text of legal philosophers and Supreme Court opinions. By comparing majority, concurring and dissenting opinions in a given case, the intent of the justices emerges. Comparing related cases on court access, precedent then emerges, in which the evolution in legal thought can be traced. Evidence of tradition and applied court policies, identified through court case histories and news accounts, can then reveal possible disconnects in the law between Supreme Court precedent and how lower courts have applied the law.[41]

Historical research is often linked to legal research. Understanding the evolution

---

[39] Wilson Huhn, *The Five Types of Legal Argument* (Durham, N.C.: Carolina Academic Press, 2008), 4.

[40] Ibid., 7-13.

[41] Ibid., 14-17.

of law requires historical context.[42] Such a combination of historical and legal methodology provides this thesis the analytical tools to answer its research questions.

It is also not unusual for a communication scholar to delve into legal analysis. Issues of free speech and the free flow of information are often central to the study of communication. Communication scholars have published their legal research in communication journals, and in law review journals.[43] One may argue that legal research outside the realm of dedicated legal study is less beholden to the judiciary and that the communication scholar can take a look at legal precedent with a more legally-disinterested eye, meaning the scholar is less concerned with using case law to bend an argument.[44] Finally, traditional legal research provides the communication scholar with a method for argument:

> The legal researcher sets down a provocative proposition and marshals evidence to support its plausibility, and that evidence may come from opinions for the court, dissenting opinions, legislative histories, constitutional interpretation, and legal commentaries.[45]

The primary focus of this thesis is to examine the U.S. Supreme Court's role in establishing a constitutional right of access under the First Amendment. Thus, I explore two key rulings that came down a year apart: In *Gannett Co. v. DePasquale* the High Court found no constitutional right for the press to attend pretrial hearings, such as

---

[42] *Gillmore*, 331.

[43] Ibid., 333.

[44] Ibid., 344.

[45] Ibid., 335.

evidentiary and suppression hearings.[46] In the second, *Richmond*, the court held the press had a constitutional right of access to cover trial proceedings.[47] I begin by examining the perceived problem judges had with press coverage of criminal trials. Several early Supreme Court rulings did not bode well for the press. One case involving a high-profile murder trial was so extreme, justices cautioned reporters for restraint and civility.[48] Soon the issue of pretrial publicity and the press's right to cover court hearings was addressed head on, a year before *Richmond* the Supreme Court found no constitutional right of access in covering pretrial hearings by the press.[49] After the ruling, however, some justices seemed to have regretted their decision. This is supported by public statements made by five justices, who emphasized the importance of the press's role in the justice system.[50] I argue these statements were made after a rash of court closures hit the country. A study conducted by the American Society of Newspaper Editors showed there had been several hundred motions to close court hearings by judges before *Richmond.*[51]

---

[46] *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

[47] *Richmond Newspapers, Inc. v. Virginia,* 448 *U.S.* 555 (1980).

[48] *Sheppard v. Maxwell, Warden,* 384 U.S. 333 (1966).

[49] *DePasquale.*

[50] See: Ed Cony, "The Growth of Secret Trials," *Wall Street Journal*, December 17, 1979, 24. Linda Greenhouse, "Stevens Says Closed Trials May Justify New Laws," *The New York* Times, September 9, 1979, 41. Editorial, "The Open Disarray of Closed Justice," *The New York Times*, August 18, 1979, 18. Linda Greenhouse, "Powell Says Court Has No Hostility Toward Press," *The New York Times*, August 14, 1979, A, 13. Linda Greenhouse, "Stevens Says Closed Trials May Justify New Laws," *The New York Times*, September 9, 1979, 41.

[51] Deirdre Carmody, "Newspapers Debating Effect of Court Rulings On Their Operations: Newspapers Debate Rulings' Effect Upon Operations 'A Dampening Effect' A Never-Ending Battle Ordered Not to Write Nuisance Lawsuits," *The New York Times*, April 7, 1980, A, 1.

Judges had taken the court's opinion as carte blanche to exclude the press.

A review of 17 U.S. Supreme Court decisions from 1936 through 1984 shows the legal evolution of the court regarding press access.[52] In addition, news articles not only show the press's reaction to these rulings, but also show evidence of court closures by judges across the country and their lax reasoning.[53] Law review articles regarding *Richmond* support the notion that from both an historical and legal perspective, this was a landmark case for journalists, attorneys and citizen groups concerned over access rights.[54]

Taken together, these data indicate that even today some judges and bureaucrats resist the notion that the public's business should be conducted in public. A brief review of news articles since *Richmond* shows judges continuing to disregard this right by giving

---

According to the study done by the American Society of Newspaper Editors, 239 motions for closure were known, of those 185 were examined. Of the 185 attempts, 121 involved pretrial proceedings, 37 involved trials or convictions, 19 involved pre-indictment proceedings and eight involved sentencings.

[52] *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). *Irvin v. Dowd*, 381 U.S. 532 (1961). *Estes v. Texas*, 381 U.S. 532 (1965). *Sheppard v. Maxwell*, 384 U.S. 333 (1966). *New York Times Co. v. U.S.*, 403 U.S. 713 (1971). *Branzburg v. Hayes*, 408 U.S. 665 (1972). *Pell v. Procunier*, 417 U.S. 817 (1974). *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974). *Murphy v. Florida*, 421 U.S. 794 (1975). *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976). *Houchins v. KQED*, 438 U.S. 1 (1978). *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979). *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980). *Chandler v. Florida*, 449 U.S. 560 (1981). *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984). *Waller v. Georgia*, 467 U.S. 39 (1984).

[53] *See*, e.g., Charlotte Evans, "Rising Number of Court Cases Closed to Press," *The New York Times*, October 13, 1979, 21.

[54] *See*, e.g., Michael J. Hayes, "What Ever Happened to 'The Right to Know'?: Access to Government-Controlled Information since Richmond Newspapers," *Virginia Law Review* 73, no. 6 (September 1987): 1111-1143. The author notes that the Supreme Court took the first step in ensuring democracy by supporting citizens' access to government information.

little or no weight to it against government interest.[55] The spirit of opening government to the scrutiny of the press, and thereby the public, seems to have been exchanged for an entitlement to conducting business behind closed doors for the sake of expediency. Sadly, those same individuals fail to realize the broader implication of their actions and the damage they do to our democracy and the public's confidence in its government. This thesis seeks to ascertain the legitimacy of this claim through the cited data.

[55] *See*, e.g., "Judge: Jury Selection in Western Ky. Murder Case to be Closed," *The Associated Press*, February 16, 2008. "Judges Increasingly Closing Public Access to Courts," *The Associated Press*, September 3, 2007. Dale Wetzel, "Judge Closes Hearing in Gibbs Case, Wonders if Jury Deadlocked," *The Associated Press*, July 12, 2007.

CHAPTER III

LITERATURE REVIEW - *RICHMOND* AS A LANDMARK CASE

One of the few academic articles published in the period between *DePasquale* and *Richmond* regarding court access was written by Ninth Circuit Judge, and former journalist, Hon. Alfred T. Goodwin. In his pre-*Richmond* article, Goodwin claimed that both judges and journalists had overreacted to the Supreme Court's *DePasquale* finding that the press had no constitutional right to attend criminal trials under the Sixth Amendment. He blamed both judges and journalists for failing to recognize certain necessary roles each group plays in the justice system, calling their contentious relationship a "shotgun wedding."[56] Still, Goodwin noted the rash of court closures across the nation after the ruling was "unprecedented."[57] He said judges tend to be leery of the press because, as attorneys, they are accustomed to conducting their business behind the veil of attorney-client privilege.[58] However, he also criticized the press for taking an absolutist view of the First Amendment, in which no other constitutional interest can override it, including a defendant's Sixth Amendment right to a fair trial.[59]

---

[56] Alfred T. Goodwin, "Press-Court Relations: Can They Be Improved?" *Hastings Constitutional Law Quarterly*, 1979-1980: 633.

[57] Ibid., 637.

[58] Ibid., 641.

[59] Ibid., 638.

Goodwin's article is a rare glimpse into the sometimes divisive relationship judges have with the press, even today.[60] In his conclusion, he makes a bold statement regarding what he sees as an integral relationship:

> The ultimate test of a court's persuasiveness is the degree to which the public accepts and follows its decisions. And the press is the instrument through which the courts communicate their reasoning to the public. Our authority, our persuasiveness, is linked to the vitality of the press.[61]

In a statement that would prove prophetic, Goodwin did note that the Supreme Court found no constitutional right of access under the Sixth Amendment, but had yet to address such a right under the First Amendment.[62]

Since the *Richmond* ruling a handful of legal and journalism scholars have written about the case. On the whole, these scholars tend to fall into three distinct camps: those who support the view that the case created a constitutional right; those who were skeptical about the ruling establishing a right of access; and scholars who took a derivative look at the case and wanted the right expanded to apply to other types of hearings and information. Still, it is clear that *Richmond* is seen by these scholars as a seminal case in the movement toward government access. A key citation search on legal databases[63] showed that *Richmond* has been cited in more than 2,877 state and federal cases. This includes 1,169 U.S. Supreme Court opinions, of which the most recent was in

---

[60] *See* note 48.

[61] Goodwin, 642.

[62] Ibid., 638.

[63] *See*, e.g., Westlaw, HeinOnline, Lexis Academic Universe.

1999.[64] This indicates that *Richmond* is still considered good law. In addition, about 1,400 law review articles cite the case. However, a more in-depth search of those articles revealed that, while *Richmond* is cited often, only a handful of law articles are actually dedicated to the case, or the subject of court access.

A search of U.S. law review journals shows eleven foundational articles about *Richmond*, most of them published within the first four years following the release of the ruling. Most scholars cited *Richmond* as a key case in arguing for a constitutional right of access to government information beyond criminal trials. Some argue the case supports a constitutional right to access pretrial court documents, while others argue that *Richmond*'s language is broad enough to be applied toward access to all branches of government.

One of the first law journal analyses of *Richmond* focused on the ruling as a vindication of the First Amendment after *DePasquale*.[65] Though Anthony Lewis called the handling of *DePasquale* and the fractured decisions of *Richmond* a "disaster," he concluded there would not have been a constitutional finding of access without them.[66] Lewis implied that *Richmond* would have far-reaching implications outside of court that could lead to greater access to government.[67] So far, that has not appeared to have happened.

---

[64] See *Wilson v. Layne*, 526 U.S. 603 (1999).

[65] Anthony Lewis, "A Public Right to Know About Public Institutions: The First Amendment as Sword," *The Supreme Court Review* 1980 (1980): 25.

[66] Ibid., 2.

[67] Ibid., 22.

In contrast, two months before the *Richmond* decision in 1980, legal scholar Lillian BeVier argued no First Amendment right to know existed and was skeptical that the Supreme Court would "transform" the First Amendment into a "vehicle" to impose a duty of disclosure upon the government.[68]

These first articles show how divided legal scholars were over the right of access and how best to handle involvement by the public and press within government.

Legal scholar Karen Burrows, in 1983, saw *Richmond* as an evolution of the First Amendment to better fit modern times, in which people rely more upon the press to inform them of government business given hectic modern schedules, something mentioned by Justices Burger and Brennan in their opinions in *Richmond*:

> It is not clear whether the Framers intended a specific or general interpretation of the first amendment, but if one believes in the need for the first amendment to promote free and open expression, the first amendment must go beyond what the Framers specifically intended.[69]

In 1984, journalism scholar Deckel McLean argued for an access right and called for a clear legal balancing test in which the public's right to know is assumed unless there is an overriding government interest.[70] Legal scholar Anne Cohen claimed the opinions could be extended to include court documents, both civil and criminal,[71] while fellow

---

[68] Lillian R. BeVier, "An Informed Public, an Informing Press: The Search for a Constitutional Principle," *California Law Review* 68, no. 3 (May, 1980): 484.

[69] Karen B. Burrows, "First Amendment – The Right of Access to Criminal Trials Extended," *The Journal of Criminal Law & Criminology* 73, no. 4 (1983): 1388.

[70] Deckel McLean, "The Impact of *Richmond Newspapers*," *Journalism Quarterly* (1984): 786.

[71] Anne Elizabeth Cohen, "Access to Pretrial Documents under the First Amendment," *Columbia Law Review* 84, no. 7 (November 1984): 1813.

legal scholar Michael Hayes claimed in 1987 the broad language used by the justices could extend the right to other branches of the government outside of the judicial branch, citing the political speech right of a citizen to be able to participate in governance.[72] Later, legal scholar Timothy Dyk cited the case as a call for a special press access right above that of the general public, claiming the importance of the press as a proxy for public participation. In finding that *Richmond* lacked unity and clarity, Dyk also called for a clear balancing test that would eliminate arbitrary decisions by judges.[73]

A few legal scholars appeared to be more pessimistic about the ruling's significance. Lyle Denniston wrote that the ruling would do little to stop judges from kicking out journalists, citing language in Justice Brennan's *Richmond* opinion that appeared to give leeway to judges to set aside the right of access under "appropriate circumstances."[74] Others argued against *Richmond*, saying judges should have a right to deny access to hearings and trials,[75] as well as pretrial documents,[76] both as a way to maintain order and control over the judicial process.

---

[72] Michael Hayes, "What Ever Happened to 'The Right to Know?': Access to Government-Controlled Information since Richmond Newspapers," *Virginia Law Review* 73, no. 6 (September 1987): 1111.

[73] Timothy B. Dyk, "Newsgathering, Press Access and the First Amendment," *Stanford Law Review* 44, no. 5 (May 1992): 927.

[74] Lyle Denniston, "Right of Access: the Birth of a Concept," *California Law Review* (November 1982): 47.

[75] Burton B. Roberts, ed. George R. Rodman, "A Judge's View," *Mass Media Issues: Analysis and Debate* (Chicago: Science Research Associates, 1984), 283.

[76] Arthur R. Miller, "Confidentiality, Protective Orders, and Public Access to the Courts," *Harvard Law Review* 105, no. 2 (December 1991): 427.

Richmond continues to be cited in more recent events. After the attack on the World Trade Center in New York City on September 11, 2001, the government took steps to restrict access to court hearings and certain kinds of information. Howard Chu cited *Richmond* in his argument against closing federal immigration hearings to the public after the Bush Administration closed deportation hearings,[77] particularly for people of Middle-Eastern descent.

Some communication scholars have also analyzed the subject of courtroom access. In 1984, Roy Leeper conducted an analysis of *Richmond*, breaking down each of the seven concurring opinions and then exploring the objections by legal scholars over the fractured nature of the ruling. Leeper explored the possibility of using the open language of the justices to expand a right of access to other types of government hearings and information.[78] In 1986, Ann Plamondon conducted an analysis of *Richmond*, and the Supreme Court cases which sprang from it, to argue that the right of access has continued to evolve to include more types of court hearings, outside of criminal trials (this will be further discussed later in this thesis). She also argued that it appeared the Supreme Court indicated a right of access should be limited and certain information or testimony may be sealed from public view for a variety of reasons expressed by judges, including private information, security concerns, or trade secrets in civil litigation.[79]

---

[77] Howard W. Chu, "Is Richmond Newspapers in Peril after 9/11?" *Ohio State Law Journal* 64 (2003): 1655.

[78] Roy V. Leeper, "Richmond Newspapers, Inc. v. Virginia and the Emerging Right of Access," *Journalism Quarterly* 6, no. 3 (1984): 615.

[79] Ann L. Plamondon, "Recent Developments in Law of Access," *Journalism Quarterly* 63, no. 1 (1986): 61.

Over the years, other communication scholars have taken a more derivative look at courtroom access, choosing to focus on specific issues, such as an access right to civil discovery materials, federal immigration deportation hearings, and juvenile courts.[80] Kathleen Olson conducted an interesting analysis of the Supreme Court's attitude toward courtroom access corresponding to times of crisis, such as the attacks on 9/11.[81]

Among the works of legal and communication scholars, none focus on the one-year period between *DePasquale* and *Richmond*, look at the underlying historic and legal situation that gave rise to both cases, or the reaction by the press, judges and justices in that one-year period.

Fewer books address the issue of *Richmond* or court access. A database search for books[82] revealed literally thousands of books that cite "court access" and/or "Richmond Newspapers." Unfortunately, the majority of published books in this list are college-level textbooks related to law or journalism.[83] The case is usually cited as an important historic

---

[80] *See* Hosoon Chang, "The News Media's Right of Access to Pretrial Discovery Materials in Civil Lawsuits," *Journalism Quarterly* 71, no. 1 (1994): 145. Dale L. Edwards, "If It Walks, Talks and Squawks Like a Trial, Should It Be Covered Like One? The Right of the Press to Cover INS Deportation Hearings," *Communication Law & Policy* 10 (2005): 217. Emily Metzgar, "Neither Seen Nor Heard: Media in America's Juvenile Courts," *Communication Law & Policy* 12 (2007): 177.

[81] Kathleen Olson, "Courtroom Access after 9/11: A Pathological Perspective," *Communication Law & Policy* 7 (2002): 461.

[82] Typically WorldCat is the most comprehensive book database, but this author also searched for books related to *Richmond* and court access in Lexis Academic Universe, Jstore and Google Books as well.

[83] *See*, e.g., Thomas L. Tedford and Dale A. Herbeck, *Feedom of Speech in the United States* (State College, Penn.: Strata Publishing, 2005). Don R. Pember and Clay Calvert, *Mass Media Law* (New York: McGraw-Hill, 2010).

moment in legal and journalism history.

Still, a few books dedicate a chapter to the subject of court access, and one author was found to have dedicated an entire book to the issue. Warren Freedman's book, *Press and Media Access to the Criminal Courtroom*, appears to be a rare work on the subject.[84] Though short, 126 pages, Freedman's study looks at the Supreme Court's evolution of access to court hearings, as well as the issue of access to court documents. He also tackles issues of prior restraint of the press by judges, tort liability, treatment of juveniles in court, pretrial publicity, and the presence of electronic recording devices in courtrooms. Freedman's work is broader in scope than this thesis but lacks some of the detail this thesis explores, such as events surrounding *DePasquale* and *Richmond*. However, his book covers many more topics that greatly contribute to the understanding of the importance of court access.

The book *Covering the Courts* compiles works from various authors, and dedicates most of its space to how courts apply access to high-profile trials, such as the trials of Timothy McVeigh and O.J. Simpson. It also addresses the issue of cameras in the courtroom.[85] Author Bruce Sanford focused his conference paper on the importance of court access and called for the Supreme Court to speak once again on the subject to create a definitive legal test.[86] Writing on *Richmond*, Sanford noted, "Not since *New York Times*

---

[84] Warren Freedman, *Press and Media Access to the Criminal Courtroom* (Westport, Conn.: Greenwood Press, 1988).

[85] Robert Giles and Robert W. Snyder, eds., *Covering the Courts: Free Press, Fair Trials & Journalistic Performance* (New Brunswick, N.J.: Transaction Publishers, 1999).

[86] Ibid., "No Contest," 3.

v. Sullivan had the Court taken such a breathtaking constitutional step in the free speech area."[87] David O'Brien took a more critical look at court access, and wrote that the *DePasquale* and *Richmond* decisions actually did more harm to the right of access than good because of their ambiguity and clear lack of guidance to the courts as to when closure is justified.[88]

Whether speculating on future potential or arguing for a constitutional right of access, the common thread among these scholars is that they focused on how *Richmond* should be applied, but spent little, if any, space exploring the legal and historic context that gave rise to the ruling. It is helpful in understanding the purpose of *Richmond* and its role in creating an access right to look at the situation created by *DePasquale* a year prior, reaction by press, scholars and even the justices themselves, leading up to its creation. It is also helpful to visit key cases that lead to the *DePasquale* decision in order to gain insight into the building frustration of judges regarding press behavior during criminal trials. This thesis seeks to fill in this knowledge gap by offering a study of the context in which *Richmond* came about and emphasize its importance in protecting the rights of the public and press to access court hearings - a need that remains important to this day as judges and journalists continue to struggle with finding ways to coexist.

---

[87] Ibid., 7.

[88] David M. O'Brien, "The Trials and Tribulations of Courtroom Secrecy and Judicial Craftsmanship: Reflections on Gannett and Richmond Newspapers," in *Censorship, Secrecy, Access, and Obscenity*, Theodore R. Kupferman, ed. (Westport, Conn.: Meckler Corp., 1990), 177.

CHAPTER IV

THE BUMPY ROAD TO *RICHMOND* - A LEGAL AND HISTORIC EVOLUTION

The main motive for judges seeking to close pretrial hearings and trials to the press and public stems from the constitutional right of a defendant to have a "speedy and public trial, by an impartial jury."[89] Judges fear that pretrial publicity in a criminal case will taint prospective jurors and ruin a defendant's chances of being judged by a jury that is impartial to the facts in the case. One particular murder trial came to embody press behavior at its worst: *Sheppard v. Maxwell*.[90]

Caught up in a wave of publicity, reporters descended upon Cleveland, Ohio, in 1954 to cover the murder of Marilyn Sheppard, the pregnant wife of Dr. Sam Sheppard. Mrs. Sheppard was found bludgeoned to death on July 4, 1954, in the upstairs bedroom of the couple's Cleveland-suburb home. Sheppard recounted struggling with a "shadowy figure" in the bedroom before he was knocked unconscious.[91]

Sheppard was arrested and charged in his wife's murder, actions demanded by

---

[89] United States Constitution, Bill of Rights, Sixth Amendment.

[90] *Sheppard v. Maxwell, Warden,* 384 U.S. 333 (1966). *See*, e.g., Freedman, 87. Freedman writes that *Sheppard* was the first time the Supreme Court took concern over pretrial publicity and its possible threat to a criminal defendant's fair-trial right.

[91] *Sheppard*, 336.

local newspapers.[92] During the investigation, police allowed reporters into Sheppard's home to pick through the crime scene and take photos. This was ironic since police had said they had taken the home into "protective custody" and it would remain so until after the trial.[93] The local coroner, Dr. Sam Gerber, held an inquest in a high school gymnasium with the press and public present. In a live broadcast, before an audience of hundreds, Sheppard was questioned for five and one-half hours about the circumstances surrounding his wife's murder, as well as an affair he had with another woman.[94]

By the time the case went to trial, press coverage saturated almost every aspect of the court proceedings. The names and addresses of jurors were published in newspapers. Jurors reported receiving phone calls from people pressuring them to convict Sheppard. Members of the press were seated so close to the defense table in the trial courtroom that Sheppard's attorney could not have a private conversation with his client without reporters being able to listen in.[95] On Dec. 21, 1954, the jury found Sheppard guilty of his wife's murder, but the conviction was later appealed.[96] Although upholding his conviction, one Ohio Supreme Court justice noted that the trial had the atmosphere of a

---

[92] Ibid., 339.

[93] Ibid., 337.

[94] Ibid., 339.

[95] Ibid., 339-42.

[96] Sheppard was convicted in the Court of Common Pleas of Cuyahoga County, Ohio. His conviction was affirmed by the Court of Appeals for Cuyahoga County, 100 Ohio App. 345, 128 N.E. 2d 471 (1955); and the Ohio Supreme Court, 165 Ohio St. 293, 135 N.E. 2d (1956).

"Roman Holiday."[97]

Sheppard's case later inspired several television shows and the motion picture, *The Fugitive*. Twelve years later the U.S. Supreme Court determined Sheppard did not receive a fair trial, due in part to the excessive press coverage. "The fact is that bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard," wrote Justice Tom C. Clark in the majority opinion.[98] In an 8-1 decision, the majority held that Sheppard was denied his Sixth Amendment right to trial by an impartial jury by the pervasive publicity surrounding the case. The First Amendment was never a factor in the case. In fact, Justice Clark made clear that the function of the press was acknowledged:

> A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for [w]hat transpires in the court room is public property.[99]

One could argue that *Sheppard* was more of an indictment of the judge, prosecution and public officials than anyone else. Clark lambasted the trial judge for failing to control the officers of the court and for allowing extrajudicial information to

---

[97] Ohio Supreme Court, 165 Ohio St. 293, 135 N.E. 2d (1956), 342.

[98] *Sheppard v. Maxwell, Warden,* 384 U.S. 333 (1966), 355.

[99] Ibid., 384.

reach the eyes and ears of jurors.[100] Clark specifically pointed out that Sheppard's Sixth Amendment rights would have been preserved had the trial judge taken certain "remedial measures" to control the flow of information during trial. These included issuing a gag order to prevent attorneys from making prejudicial statements to the press, warning the press of publishing information not presented as evidence to the jury, changing the venue or delaying the trial to avoid publicity affecting jurors, and sequestering the jury from outside publicity.[101] Already we can see the Supreme Court beginning to form ways in which the courts can protect the rights of a criminal defendant without barring the press from attending. Clark's list of suggestions would begin to permeate future rulings, although we will soon see that his suggestion of controlling what the press writes about a case will run into a First-Amendment problem. Despite the seemingly outrageous behavior by reporters, Clark and seven other concurring justices exhibited uncanny restraint in not holding outright blame on the press. "In this manner," Clark wrote, "Sheppard's right to a trial free from outside interference would have been given added protection without corresponding curtailment of the news media."[102]

The ruling also served as a reminder to the press that its presence in the courtroom was based on tradition and was subject to restriction by the trial judge. Clark wrote, "We have consistently required that the press have a free hand, even though we sometimes

---

[100] Ibid., 363.

[101] Ibid., 360-363. These judicial alternatives have become known as the Sheppard Mandates.

[102] Ibid., 362.

deplore its sensationalism."[103]

Such outrageous behavior by the press sparked debate and concern by judges, which is reflected in a series of Supreme Court rulings regarding pretrial publicity. In *Irvin v. Dowd* (1961), the Supreme Court ruled a criminal conviction can be overturned if publicity results in an identifiable bias of the jury. Justice Clark noted in the majority opinion that the presence of a "pattern of deep and bitter prejudice" could result in a "wave of public passion," which could harm a defendant's chance to a fair trial.[104] In *Estes v. Texas* (1965), justices found in a 5-4 decision that television cameras in the courtroom could be inherently prejudicial to a defendant,[105] calling photography and cameras an "indulgence" and stating that the preservation of a publicity-free atmosphere "must be maintained at all costs."[106] Justice Clark's legal reasoning was that the presence of cameras would have a psychological effect on witnesses giving testimony and jurors, who may watch television trial coverage, influencing their decision. Both groups, Clark argued, would be tempted to conform to community opinion and therefore deny the defendant his right to trial by an impartial jury, and to confront his accusers and know what evidence is against him under the Sixth Amendment.[107]

But does pretrial publicity always poison the jury pool? That issue was studied in

---

[103] Ibid., 350.

[104] *Irvin v. Dowd,* 366 U.S. 717 (1961), 729.

[105] *Estes v. Texas,* 381 U.S. 532 (1965), 544.

[106] Ibid., 541.

[107] Ibid., 545.

1954 by First Amendment legal scholar, and well-known litigation expert, Harry Kalven, who concluded that jurors were not likely swayed by media remarks. Jurors in the study recalled reading about the criminal case prior to the trial, but many indicated it did not prevent them from changing their minds.[108] However, further social scientific studies of jurors and their susceptibility to press publicity has been very limited.[109]

In 1967, after two years of study, the American Newspaper Publishers Association published a report regarding the state of press access to court proceedings.[110] Having examined Colonial history, constitutional origins of the First and Sixth amendments, Supreme Court precedent and lower-court rulings, the report found there was no real conflict between the First Amendment guarantee of free press and the Sixth Amendment rights to a fair and speedy trial, even though there appeared to be a presumption made by members of the Bar that the right to a fair trial is not compatible with a free press in courts. In fact, the report found the press had a positive influence in assuring a fair trial by providing an oversight function that prevents attorney and judicial misconduct.[111]

The case of jewel thief "Murph the Surf" contributed to the discussion of pretrial publicity. In 1975, the Supreme Court ruled 8-1 in *Murphy v. Florida* that a juror's prior knowledge of a case alone does not prove bias.[112] Murphy was on trial for the armed

---

[108] Harry Kalven and Hans Ziesel, *The American Jury* (Boston: Little, Brown, 1966).

[109] Donald M. Gillmor, *Free Press and Fair Trial* (Washington D.C.: Public Affairs Press, 1966), 168.

[110] American Newspaper Publishers Association, *Free Press and Fair Trial* (New York, 1967).

[111] Ibid., 1.

[112] *Murphy v. Florida*, 421 U.S. 794 (1975), 794.

robbery of a Miami Beach home, but he was already notorious for his part in the 1964 theft of the Star of India sapphire from a museum in New York. This historic theft and his "flamboyant lifestyle" made Murphy a popular media figure.[113] Murphy argued that media reports of his previous crimes had tainted the jury in his armed robbery trial. Justice Thurgood Marshall wrote in the court's opinion that a juror need not be totally ignorant of the facts in a case.[114] The difference between *Murphy* and *Sheppard* was that there was no evidence the press interfered directly in the trial process in *Murphy*. The issue was one of pure pretrial publicity and its possible effect on jurors. Marshall's use of the term "utterly corrupted"[115] and dissenting Justice William J. Brennan's use of the term "infected with taint"[116] indicate that the Supreme Court at times viewed the presence of the press in courtrooms as a lingering infection that could flare up and cause problems for the courts. Still, Marshall wrote that the burden is on the defendant to demonstrate that a juror has an opinion other than a willingness to be impartial, and that the defense in Murphy's case had shown no such "hostility" or unwillingness by jurors to lay aside partiality during *voir dire*.[117]

In 1976, 7th U.S. Circuit Court of Appeals Judge William J. Bauer, speaking on a journalism panel before the American Society of Newspaper Editors, noted that in his

---

[113] Ibid., 796.

[114] Ibid., 800.

[115] Ibid., 798.

[116] Ibid., 808

[117] Ibid., 800.

fourteen years as a prosecutor and ten years as a judge he had never experienced pervasive jury bias due to press coverage.[118] In his account, which at times included salty language, Bauer estimated that even in trials that had press coverage months prior, most jurors could not clearly recall what the coverage was about exactly. "Incidentally, in those areas where the community is so small that everybody in the community knows what the hell happened anyway, I don't think the media has any impact either," Bauer said; the reason being that prospective jurors cannot be kept completely in the dark and his experience showed most jurors are willing to set aside what they have heard about a case.[119]

Yet by 1976, justices were still struggling with press coverage in the courtroom. In *Nebraska Press Association v. Stuart*, a unanimous Supreme Court ruled a Nebraska judge's order preventing the press from publishing information about a criminal defendant's alleged confession constituted prior restraint and violated the First Amendment.[120] In writing the majority opinion, Chief Justice Warren E. Burger said such an order bore a heavy burden by a judge to prove that a fair trial was not possible without prior restraint.[121] Burger called prior restraint "one of the most extraordinary remedies known to our jurisprudence," and should only be considered as a last resort after other

---

[118] American Society of Newspaper Editors, *Problems of Journalism: Proceedings of the American Society of Newspaper Editors, 1976* (Washington, D.C.: Newspapers Under Fire, 1976), 226.

[119] Ibid., 227.

[120] *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976).

[121] Ibid., 559.

alternatives, as cited in *Sheppard*, have been considered.[122]

> We affirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact.[123]

However, Burger noted that under Nebraska law, one alternative was for the judge to simply close the preliminary hearing to the press and thus eliminate the need for prior restraint.[124] A journalist might have seen this as a sledgehammer solution to a thumbtack. Giving judges a procedural out in suggesting to close pretrial hearings before reporters can write about them diminished the ruling's language about defending freedom of press and diminished the role of the press as "handmaiden of effective judicial administration."[125]

In three other rulings that took a broader look at press access to government, the justices ruled that the press had no constitutional right to enter prisons to interview specific inmates or inspect and report on prison conditions.[126] These rulings also helped to solidify the High Court's view that the press and public had little, if any, entitlement to access government facilities by finding there was no right of access under the First Amendment. Without a constitutionally backed right of access to government, the public and press were mere guests at the humor of government officials.

---

[122] Ibid., 562-563.

[123] Ibid., 570.

[124] Ibid., 569.

[125] *Sheppard v. Maxwell, Warden,* 384 U.S. 333 (1966), 350.

[126] *Pell v. Procunier*, 417 U.S. 817 (1974). *Saxbe v. Washington Post*, 417 U.S. 843 (1974). *Houchins v. KQED*, 438 U.S. 1 (1977).

These prison access cases, taken along with the legal reasoning in *Sheppard*, *Murphy*, *Estes*, and *Nebraska Press*, would stack the deck against any finding of a constitutional right of access to courts. *Sheppard* and *Murphy*, although they had different outcomes, established in the minds of the justices that the press specifically could be problematic in its behavior. *Estes* helped to solidify this sentiment with the introduction of electronic mass media technology, which threatened to further taint the pool of prospective jurors, and caused the High Court to conclude that the integrity of justice must be maintained at all cost. This sentiment was tempered in *Nebraska Press*, which ruled out prior restraint as an option, but hinted at a more brutish solution: closing the courtroom to the press and public.

DePasquale: a "Flood Tide" of Closures

In July 1976, 42-year-old Wayne Clapp of Henrietta, New York, disappeared. He had been last seen on a boat at Seneca Lake. When police found the boat riddled with bullet holes and no sign of Clapp, they decided it was murder.[127] After an intensive search, police arrested two males, 16 and 21, in Michigan. The 16-year-old's wife was also arrested. Police recovered a murder weapon and Clapp's truck in the area of the group's arrest. Returned to New York, the two males faced murder, robbery, and grand larceny charges. The suspect's wife was charged with grand larceny.[128]

---

[127] *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), 372. I have chosen to refer to this case by the defending party in order to avoid confusion with other cases in which Gannett Co. was involved in.

[128] Ibid., 374-375.

During this time, two New York papers owned by Gannett Co., the *Democrat & Chronicle* and the *Times-Union*, ran a series of articles detailing the arrests and investigation. The articles cited charging documents in which the defendants were accused of shooting Clapp on the boat with his own gun and weighing his body with anchors before tossing his body overboard, among other details.[129]

Before the trial, the defendants filed a motion to exclude the press and public from an evidence suppression hearing, claiming the "unabated buildup of adverse publicity" was going to ruin their chances of a fair trial.[130] With no objection from the prosecution, Judge Daniel A. DePasquale granted the defense motion, ruling that the interest of the press and public was outweighed by the defendants' right to a fair trial under the Sixth Amendment. Although DePasquale actually found the press had a constitutional right of access, he ruled that opening the suppression hearing would pose a reasonable probability of prejudice to the defendant, thus violating his Sixth Amendment rights, and granted the motion for closure.[131] Gannett took legal action before the New York Supreme Court, arguing the press has a right to attend pretrial hearings under the First Amendment right of free press and the Sixth Amendment right of public trial, and lost.[132] Gannett appealed

---

[129] Ibid., 372. Charging documents in the case stated the two males took Clapp's credit card, gun, and truck. The papers noted that although police had dragged the lake, no body was found, making it the first murder case in New York state history to be tried without a body.

[130] *DePasquale*, 372.

[131] Ibid., 376.

[132] *Gannett Co. v. DePasquale*, 55 App. Div. 2d 107, 389 N.Y.S. 2d 719 (1976).

and the U.S. Supreme Court handed down its decision in July 1979. In a 5-4 ruling, the Supreme Court held that the press has no affirmative right to attend pretrial hearings under the Constitution. The majority opinion, penned by Justice Potter Stewart, brought forward four points:

- The court has a duty to "safeguard" the due process rights of the accused.
- The Sixth Amendment's guarantee of a public trial is for the benefit of the defendant and not the press.[133]
- Even if the Sixth Amendment and the Fourteenth Amendment (which holds state laws to a constitutional standard) embodied a common-law right to attend criminal trials, it is not a constitutional right as is the defendant's right to a fair trial.
- Even if, by argument, there is a constitutional right under the First and Fourteenth amendments for the press to attend criminal trials, it has been given deference by the trial judge, who found the defendant's interest outweighed that of the press.[134]

The ruling raised eyebrows in the legal community and stunned reporters. In reaction to the *DePasquale* decision, Allen H. Neuharth, chairman and president of Gannett, said:

> This decision to permit the courts to lock the public out of the courtroom is another chilling demonstration that the majority of the Burger court is determined to unmake the Constitution.... This case is not simply a matter of free press versus fair trial. Rather, it is the Supreme Court saying that the judiciary is a private, Supreme Club, which can shut the door and conduct public business in private.[135]

Neuharth pointed out that because 90 percent of criminal indictments are settled in pretrial hearings, the public would only get a "10 percent peek" at what judges do.[136]

---

[133] While noting this, Justice Stewart acknowledged a "strong societal interest in public trials." However, members of the public who are not parties to the case have no enforceable right to attend.

[134] *DePasquale*, 369-370.

[135] James H. Rubin, *Associated Press* [Washington], July 2, 1979.

[136] Ibid.

Four justices joined in a dissenting opinion. In writing the dissent, Justice Harry A. Blackmun called the ruling "inflexible," in that if the defense and prosecution merely agree to close hearings from the public the trial judge will likely go along with the motion. Blackmun differentiated the case from the previous cases of *Sheppard* and *Murphy* by pointing out that the reporters in this case were sticking to facts and not sensationalizing the case and accused the justices in the majority of over-coloring events to support their conclusions.[137] Although the case was framed in argument as the First Amendment versus Sixth Amendment conflict, Blackmun noted that his fellow justices did not find any "First Amendment right of access to judicial or other government proceedings." Instead, their argument rather turned on the Sixth Amendment to determine access.[138] "The result is that the important interests of the public and the press (as part of that public) in open judicial proceedings are rejected and cast aside as of little value or significance," Blackmun wrote.[139]

Several justices also filed supplemental concurring opinions in *DePasquale* to support the plurality ruling, some of which caused confusion by contradicting the plurality opinion. Chief Justice Warren Burger stressed the lack of common-law support for access to pretrial hearings, as opposed to trials themselves, which were supported by common law to be open to the public.[140] "By definition, a hearing on a motion before

---

[137] *DePasquale*, 409.

[138] Ibid., 411.

[139] Ibid., 407.

[140] Ibid., 397.

trial is not a *trial*; it is a *pretrial* hearing."[141] Burger, however, left a substantial dangling question at the end of his concurring opinion. Burger pointed out that 85 percent of criminal cases were resolved before trial, mostly due to guilty pleas being entered as part of plea agreements with the prosecution.[142] Burger failed to address the obvious: If 85 percent of criminal cases are resolved before trial without the ability for the public or press to observe, just how transparent can justice be? Open courts advocate and legal scholar Susan Swift criticized the concurring justices after the ruling came down, pointing out the flawed logic in distinguishing between First Amendment right to access trials and Sixth Amendment right against access to pretrial hearings.[143] Swift questioned why Justice Stewart would write that press access to trials helps guard against judicial and prosecutorial malfeasance, while overlooking the same need in pretrial hearings.[144] Swift noted that, in particular, evidentiary suppression hearings do pit a defendant's right to a fair trial against public access interests, but given the realities of pretrial publicity and ensuring fair due process, she argued ensuring fair due process through public observation was the more important.[145] Swift wrote:

> Publication of inadmissible evidence subverts the function of the hearing. At the same time, the public has a legitimate right to the information which is made available at suppression hearings, for it is there that direct evidence of police and

---

[141] Ibid., 394.

[142] Ibid., 397.

[143] Susan Freya Swift, "Gannett Co. v. DePasquale: A Judicial Aberration," *Communication/Entertainment Law Journal* 3, no. 2 (1980-1981): 273.

[144] Ibid., 293.

[145] Ibid., 274.

prosecutorial lawbreaking is received in court.[146]

Justice William H. Rehnquist caused the most confusion with his concurring opinion, in which he lumped pretrial hearings and trials in the same category, stating that if both the prosecution and defense agree, "the trial court is not required by the Sixth Amendment to advance any reason whatsoever for declining to open a pretrial hearing **or trial** to the public."[147] Rehnquist insisted there was no right of access under the First Amendment and, therefore, a defendant's Sixth Amendment right to a fair trial would override a claim of access. This blurring of the distinction between trial and pretrial would prove problematic to judges who attempted to interpret and apply the ruling in their courts (something which will soon be discussed in this thesis). In fact, Rehnquist mentioned "trial" with "pretrial" several times in his opinion.

Justice Lewis F. Powell Jr., while supporting the majority opinion by concurring, wrote an opinion that was clearly dissenting in nature. He plainly stated that while an access right by the press did not exist under the Sixth Amendment because the right of a public trial was solely for the defendant, one did exist under the First Amendment under the legal theory of an informed populace, and he called for a clear balancing test that the courts could use to determine closure. Citing the court's decisions in *Estes*, *Sheppard* and *Nebraska Press*, Powell noted the need for additional direction to the lower courts.

Powell said it was clear from *Nebraska Press* that there is a "strong presumption" against prior restraint in prohibiting the publication of courtroom proceedings. Powell

---

[146] Ibid., 291.

[147] *DePasquale*, 405 (Bold words, "or trial," are author's emphasis).

saw the conflict as a strict balancing test between free press and fair trial, "an accommodation under which neither defendant's rights nor the rights of members of the press and public should be made subordinate."[148] In other words, neither constitutional interest would be given preference right off of the bat. The exact question then for a trial judge to consider, Powell surmised, is: Would pretrial publicity likely jeopardize a defendant's right to a fair trial?[149] Thus, when a defendant requests closure, a judge must consider alternative means, but the burden of showing those means is upon the press. Likewise, the burden is upon the defendant to justify closure due to likely prejudice being produced if hearing is kept open. The state may also join a request for closure, but it must show that keeping a hearing open would interfere with fair proceedings and preservation of confidential information. Upon request for closure, the press must immediately object, but later be given a chance to be heard. If a judge grants closure, the ruling must be narrowly tailored as to not unnecessarily interfere with the right of access. The ruling must also be narrow in terms of time with an eventual plan to release court transcripts once threat of prejudice has passed.[150]

Ironically, Powell's dissenting voice in *DePasquale* was never heard in *Richmond* because he abstained from the case. It gives one pause to think that, had Powell been able to participate in *Richmond*, whether his call for a clear test, and suggested framework, might have cleared up some of the confusion. But this ruling also came down at a time

---

[148] Ibid., 401.

[149] Ibid.

[150] Ibid., 400-403.

when members of the press seemed embattled against government secrecy.

The years leading up to 1979 were filled with social and political upheaval. A broader look at the period before the *DePasquale* decision deserves brief discussion. The nation had just come out of the conflict in Vietnam, soured by an extended military campaign that cost many American military lives. In 1971, *The New York Times* and *Washington Post* published a series of articles based on a secret Pentagon study of the Vietnam War, dubbed the Pentagon Papers. The study indicated that both Republican and Democratic administrations had misled the public about the country's objectives in Southeast Asia. Under the guidance of the Richard M. Nixon administration, the U.S. Department of Justice petitioned the federal court to enjoin both papers from further publication of the Pentagon Papers, citing national security. In a 6-3 decision, the Supreme Court ruled the government had not provided a compelling interest to override a "heavy burden" to justify prior restraint, as Justice William J. Brennan wrote.[151] In the years following, the Nixon administration turned its sights on journalists themselves. Between 1970 and 1972, the Justice Department subpoenaed several journalists in an effort to have them divulge confidential information and sources.[152] Several journalists were jailed for failure to comply. Some subpoenas involved investigations into leaks of classified information within the federal government, while others were federal investigations into the Black Panthers organization. By 1972 and 1974, news

---

[151] *New York Times v. U.S.*, 713 U.S. 403 (1971), 714.

[152] Edward Knappman, *Government and the Media in Conflict 1970-74* (New York: Facts on File, 1974), 115-21.

organizations were dealing with warrants and subpoenas demanding searches of newsrooms and newsroom phone records.[153]

Also in 1972, the press uncovered the Watergate scandal. Burglars had broken into the Democratic National Committee's headquarters at the Watergate office complex in Washington, D.C. The suspects were linked back to the Nixon White House and the scandal led to Nixon's resignation in August 1974.[154]

In this context, the irony of the *DePasquale* ruling did not escape those opposed to it. The American Civil Liberties Union issued a statement after the ruling was issued: "Had this decision taken place before or during Watergate, the press might not have been able to report on Judge [John] Sirica's questioning of the Watergate burglars, which changed the course of history."[155] Given that judges were forcing journalists to testify before grand juries, turn over evidence at criminal trials, and open their newsrooms to police with search warrants, CBS law correspondent Fred Graham said, "The judges seem determined to show that they are boss."[156] Columbia University law professor Benno Schmidt, Jr., suggested that the press should simply deal with it: "The press's adverse reaction is grossly exaggerated....The Court has not been protective of news

---

[153] Ibid.

[154] *See*, e.g., Keith W. Olson, *Watergate: The Presidential Scandal that Shook America* (Lawrence: University of Kansas Press, 2003).

[155] Aric Press with Diane Camper in Washington and bureau reports, "Court vs. the Press," *Newsweek,* July 16, 1979.

[156] Ibid.

gathering, but no court has ever been."[157]

It was only a matter of weeks before state and federal judges began applying *DePasquale* as they saw fit. Just over two weeks from the day of the ruling's release a judge in Anne Arundel County, Maryland, cited the Supreme Court ruling when he ordered a criminal pretrial court hearing in the case of a man charged with arson closed to the public.[158] Circuit Court Judge E. Mackall Chiles said he had "no alternative" but to grant the defense's motion because pretrial publicity would have a negative effect on the defendant's right to a fair trial.[159] The prosecution in the case argued it was a public matter and that any bias by prospective jurors could be handled through the jury selection process. When *The Annapolis Evening Capital* reporter, Scott Lebar, returned for the afternoon session, the judge had ordered the hearing closed. Chiles told Lebar he could state his objections right then but would not grant him time to contact the paper's attorney. Chiles also issued a gag order, prohibiting anyone involved in the case from commenting to the press about the case.[160]

Across the country, reports of judges closing more than just pretrial hearings began to surface. *The New York Times* reported that a New York federal judge sentenced a

---

[157] Ibid.

[158] Saundra Saperstein, "Judge Shuts Maryland Pretrial Hearing; Controversial Supreme Court Ruling Invoked," *The Washington Post*, July 19, 1979, A, 1.

[159] Ibid. While understanding the reasoning behind the judge's decision would prove insightful, typically lower-court cases are not published in case reporters, or made available in general case databases. Effort to travel to the courthouse in Maryland and seek the physical case file could be undertaken, but many criminal case files, unless the subject of a major appeal, are typically expunged and destroyed.

[160] Saperstein.

man "in secret" and, on three other occasions, judges dismissed court reporters but allowed other members of the public to remain.[161]

The South Dakota Supreme Court, meanwhile, took *DePasquale* to its ultimate conclusion, ruling in September 1979 that the public had no right to be present at any part of a criminal trial. The state justices cited *DePasquale* as a reason for their ruling.[162] According to the ruling, justices found the case before them "strikingly similar" to the *DePasquale* case.[163] Bolstered by the lack of access right in *Houchins*, South Dakota justices wrote that it was clear in *DePasquale* that there was no right of access to trials.[164] One Illinois defense attorney also argued in September 1979 that the press should be thrown out if there was any doubt that it would affect the trial of a man accused of deviate sexual assault. "If there is doubt in the court's mind the defendant can get a fair trial, then the court should be more concerned about the rights of the defendant than the rights of the press," defense attorney Terry Fields was quoted as saying.[165] Unfortunately for Fields, the judge denied the motion. The judge said the Supreme Court case left it up to the judge's discretion to make the closure decision. "I'm using that discretion to deny this motion," said Judge Daniel Dailey, who found the intention of Illinois law was to

---

[161] Editorial, "The Open Disarray of Closed Justice," *The New York Times*, August 18, 1979, 18. This editorial also described actions across the country as "an epidemic of court closings across the country."

[162] Eric Newhouse, *Associated Press*, September 26, 1979, Domestic News.

[163] Ibid.

[164] *Rapid City Journal v. The Circuit Court of the Seventh Judicial District*, 283 N.W. 2d 563 (1979).

[165] *Associated Press* [Hillsboro, Ill.], September 13, 1979, Domestic News.

keep trials and courtrooms open.[166]

Other attorneys also said they believed keeping justice public was important to the system. "We believe that the press and public should be at every trial, every pretrial hearing, any court action. We do not believe in secret proceedings," said Bronx District Attorney Mario Merola, who at the time was fighting the closure of a trial regarding a 13-year-old charged with the robbery-murder of a 19-year-old man on a New York City subway platform. When asked why, Merola reportedly said the *DePasquale* ruling needed clarifying as to when hearings can be closed.[167] In Tennessee, a Chattanooga judge rejected a request by the convicted killer of a policeman to close his sentencing hearing in which he faced the death penalty.[168] While the defense cited *DePasquale* for its supporting reason, the state and local newspaper, *The Chattanooga Times*, reminded the court that the Supreme Court decision dealt specifically with pretrial hearings and not sentencing hearings, which are post-trial. However, the defendant's attorney argued that *DePasquale* did encompass such hearings.[169] Criminal Court Judge Joe DiRisio sided with the paper's interpretation of *DePasquale* and accepted its argument that its right to send a reporter was also supported by the First Amendment.[170]

These instances in support of openness appeared to have been overshadowed by

---

[166] *People v. Levine*, 55 Ill. Dec. 240 (1978).

[167] Richard T. Pienciak, *Associated Press*, Sept. 27, 1979, Domestic News.

[168] 584 S.W. 2d 765 (1979).

[169] "Judge Rules That Killer's Sentencing Hearing Should be Public," *The Associated Press*, March 28, 1980, Domestic News.

[170] Ibid.

judges and other attorneys who seemed to need little reason to kick out the press. *The New York Times* reported that one month after *DePasquale* was issued, there were about thirty motions for court closure across the country. Three months out, that number had grown to fifty-eight motions. "It becomes a flood tide where defense lawyers feel obligated to make a motion to close to protect themselves from whatever they have in their imaginations," said Gannett attorney Alice Lucan.[171] That same article reported that Albany County Judge Joseph Harris had recently unsealed a grand jury indictment, arraigned a criminal defendant during the lunch hour when reporters were away, then resealed the indictment and instituted a gag order, instructing attorneys in the case not to comment. When asked to comment, Harris said:

> I have nothing to do with reporters' lunch hours....Nobody has given me a schedule, and if they did this court is not going to drop its schedule to fit newspapers. The purpose of this court is to see that justice is done.[172]

The American Society of Newspaper Editors revealed at its April 1980 meeting that 239 motions to bar the public and press from court hearings had been filed since *DePasquale*.[173] Among some 850 daily newspaper editors attending the meeting, heads of some the nation's top papers expressed concern. *Denver Post* editor William H. Hornby envisioned a "never-ending battle" for the press and said his paper had fought to keep four trials open to the public through legal action. Louis Boccardi, executive

---

[171] Charlotte Evans, "Rising Number of Court Cases Closed to Press," *The New York Times*, October 13, 1979, 21.

[172] Ibid.

[173] Deirdre Carmody, "Newspapers Debating Effect of Court Rulings On Their Operations: Newspapers Debate Rulings' Effect Upon Operations 'A Dampening Effect' A Never-Ending Battle Ordered Not to Write Nuisance Lawsuits," *The New York Times*, April 7, 1980, A, 1.

director of The Associated Press, reported seeing a troubling increase in cases where the press and public were allowed to attend court hearings, but judges were ordering the press not to write about what they had seen or heard. Boccardi added he was aware that in most of those instances, the court's orders had been reversed.[174] Editors at the meeting said they had begun giving reporters "wallet-sized" cards with statements that could be read aloud in court, stating their organization's objection to a court closure, given incidents of judges closing hearings without giving the press a chance to take legal action.[175] Such actions by judges went against the Supreme Court's ruling in *DePasquale*, which specifically stated the press had a right to have its legal objections heard by the court. The custom of having reporters carry cards with legal statements still continues today.[176]

By July 1980, the number of motions to close criminal proceedings had swelled to 286, with fourteen more closures by November of that year.[177] Of those motions, 161 were enforced or upheld on appeal, while 125 were eventually denied or withdrawn by the filing party. Fourteen of the 300 motions were direct prior restraint by the judge.[178] "Proceedings are being sealed for such reasons as embarrassment to witnesses or

---

[174] Ibid.

[175] Ibid.

[176] This author has taken the opportunity to hand out such cards to journalists as part of a program being run by the Society of Professional Journalists.

[177] The Reporters Committee on Freedom of the Press, "Court Watch Summary" (Washington D.C.: November 18, 1980).

[178] Ibid.

defendants – in addition, to prejudice the defendant's right to obtain an impartial jury," was the conclusion of the court closure study conducted by The Reporters Committee for Freedom of the Press.[179] While the argument of a defendant's right to a fair trial had been accepted by the Supreme Court as a valid reason for closure, nowhere in *DePasquale*, or prior rulings involving access, had an argument been made that a court hearing could be closed for the reason of preventing embarrassment.

It did not take long for the justices of the U.S. Supreme Court to realize their decision was causing great confusion among the judiciary. It is rare for Supreme Court justices to make public comment, and even more rare for them to comment on cases they have settled on. But in the months following *DePasquale* five of the nine justices commented publicly on the decision.[180] Among them was Chief Justice Burger, who in an interview with the press, said judges had been misinterpreting the ruling and that *DePasquale* was limited to pretrial hearings only.[181] In a fatal attempt at humor, Burger was quoted in an editorial that many judges were "misreading" the decision. "Maybe the judges are reading newspaper reports of what we said," Burger said. *The New York Times* failed to see the humor: "That comment, while possibly an example of judicial humor, adds to our dual burden of trying to report the news while arguing for access to the forums of justice," the editors wrote.[182]

---

[179] Ibid., accompanying letter by Reporters Committee director Jack C. Landau.

[180] Ed Cony, "The Growth of Secret Trials," *Wall Street Journal*, December 17, 1979, 24.

[181] Linda Greenhouse, "Stevens Says Closed Trials May Justify New Laws," *The New York Times*, September 9, 1979, 41.

[182] Editorial, "The Open Disarray of Closed Justice," *The New York Times*, August 18, 1979, 18.

Justice Powell was quoted as saying he had no hostility toward the press during a meeting of the American Bar Association in Dallas in August 1979. "We are totally dependent on the media to interpret what we do. That's all the public knows about us. Instead of having any hostility toward you, we depend upon you very much," Powell said.[183] While not indicating that the ruling had any causality with court closures going on across the country, Powell did point out *DePasquale* did not settle the issue of the right of press access under the First Amendment.[184] Powell had supported the majority opinion, but urged a look at a right under the First Amendment and the construction of a legal test for a right of access.

Speaking at the dedication to the new law school at the University of Arizona that September, Justice John Paul Stevens, who also supported the majority opinion in *DePasquale*, admitted that judges might be too casual in granting motions for closure. As a possible remedy to the ruling he supported, Stevens suggested in his speech that new laws could be passed to rectify the situation, but added that journalists who saw the ruling as "removing the cornerstone" of the Constitution were mistaken.[185] A month before Stevens's comment, Justice Harry A. Blackmun, who wrote the dissent in the case, made a public statement that the decision did authorize the closing of full trials to the public

---

[183] Linda Greenhouse, "Powell Says Court Has No Hostility Toward Press," *The New York Times*, August 14, 1979, A, 13.

[184] Ibid.

[185] Linda Greenhouse, "Stevens Says Closed Trials May Justify New Laws," *The New York Times*, September 9, 1979, 41.

and press.[186]

On Oct. 9, 1979, only three months after its decision in *DePasquale*, and with no indication that it had perhaps made a mistake, the Supreme Court announced it had agreed to hear another court closure case: *Richmond Newspapers v. Virginia*.[187] It would be another nine months before a decision would be reached. During that time, the press would fight to keep numerous judges from closing hearings across the country.

Richmond v. Virginia: Washing Away the Graffiti

As murder trials went, *Richmond* had an unusual series of legal snags. In March 1976, a Virginia man was indicted for the murder of a hotel manager who had been found stabbed to death the previous December. The suspect was promptly tried and convicted and, had it not been for a bloodstained shirt, the media case that sprung from the trial never would have reached up to the Supreme Court. The shirt, which the prosecution claimed belonged to the defendant, had been improperly admitted into evidence. The Virginia Supreme Court reversed the conviction and remanded the case for a new trial.[188]

The case was tried again in the same court, but ended in a mistrial in May 1978 when a juror asked to be excused and no alternate was available.[189] During a third trial in

---

[186] Ibid.

[187] *Richmond Newspapers, Inc. v. Virginia (BURGER, C.J., Opinion of the Court),* 448 U.S. 555 (1980).

[188] *Stevenson v. Commonwealth*, 237 S.E. 2d 779.

[189] Ibid.

June of that year, a prospective juror allegedly tainted the jury pool during jury selection by telling others about a newspaper article the juror had read, which recounted the defendant's past two trials.[190] In the fourth trial, the judge in the case granted a defense motion to clear the courtroom of spectators, including the press.[191] The defense had argued that this was the fourth time its client was being tried and it did not want information, perhaps inaccurate information, to "leak out" via the press because the area was "a small community."[192]

Instead of laying down a sound legal argument, the trial judge blamed the size of the courtroom:

> I think that having people in the courtroom is distracting to the jury. Now, we have to have certain people in here and maybe that's not a very good reason. When we get into our new court building, people can sit in the audience so the jury can't see them. The rule of the court may be different under those circumstances.[193]

The fourth trial was held behind closed doors and the defendant was found not guilty of murder after the defense made a motion to strike the state's evidence. Richmond Newspapers appealed the closure to the Virginia Supreme Court, which dismissed the paper's appeal, finding in a one-page ruling that the lower court's decision went along with *DePasquale*.[194] The case went on to the U.S. Supreme Court.[195]

---

[190] *Stevenson*, as cited in *Richmond*, 560.

[191] *Richmond*, 560. This judge had presided over the last three trials.

[192] Ibid., 562.

[193] Ibid.

[194] *Richmond Newspapers v. Commonwealth*, 5 Media L. Rep. 1545; Virginia Supreme Court record no. 781598 (1979).

On July 2, 1980, the Supreme Court issued its decision in *Richmond* and signaled a dramatic turn in the tone it had taken toward the press in *DePasquale*. The High Court found there was indeed a constitutional right of the press to attend criminal trials.[196] To complicate matters, there were six separate opinions, five of which supported the majority opinion.

In the majority opinion, written by Chief Justice Warren Burger and supported by Justices Byron White and John Paul Stevens, the court settled on four areas to support an implied constitutional right to access. First, they found that there has been historically a tradition of open courts in both British and American colonial courts. Second, the courtroom is considered a public place under the First Amendment right to assembly and public participation in governance. Third, freedom to attend criminal trials is necessary to protect free speech, and fourth, alternative solutions to controlling pretrial publicity can be sought that are less harmful to the First Amendment right.[197]

Burger noted that throughout the histories of English and colonial law, members of the public attended trials and at times it was compulsory:[198]

---

[195] It is interesting to note that the attorneys for the state of Virginia argued the petition by Richmond Newspapers was moot because the findings of the court were later released. However, the Supreme Court justices stated they took the case because "it is reasonably foreseeable that other trials may be closed by other judges without any more showing of need than is presented on this record." *Richmond Newspapers, Inc. v. Virginia (BURGER, C.J., Opinion of the Court),* 448 U.S. 555 (1980), 563.

[196] *Richmond*, 555.

[197] Ibid., 559.

[198] Ibid., 566.

> The historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open. This is no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial.[199]

The open criminal trial goes beyond the purpose of the process. Burger noted that when a "shocking" crime happens, the community reacts with outrage.[200] A public trial provides an "outlet" for the community with the awareness that society is responding in an appropriate way.[201] It also prevents the "self-help" of vigilantes.[202] Burger cited a previous Supreme Court ruling stating, "The appearance of justice can best be provided by allowing people to observe it."[203] In a nod toward contemporary times, Burger wrote that most of the public is too busy to attend criminal trials and must rely on the press to function as "surrogates for the public."[204]

While Virginia had argued the right of access to government is not stated in the Constitution, Burger reminded that the Constitution was not a limit on freedoms and many other important rights that derive from the Constitution were also not listed, such as:

- The right to privacy.

---

[199] Ibid., 570.

[200] Ibid., 571.

[201] Ibid., 555

[202] Ibid., 572.

[203] *Offutt v.* United *States*, 348 U.S. 11, 14 (1954), as cited in *Richmond*, 572.

[204] *Richmond*, 574.

- The right to be presumed innocent.
- The right to be judged by a standard of proof beyond a reasonable doubt.
- The right to travel.[205]

Justices who dissented in *DePasquale* took the opportunity to file concurring opinions vindicating their previous protest. Justice White wrote a concurring opinion in which he noted that the *Richmond* ruling would have been "uncecessary" had the High Court not construed the Sixth Amendment allowing the public to be excluded from criminal proceedings.[206] Justice Thurgood Marshall, who established that jurors need not be tainted by press coverage in *Murphy*, joined Justice William Brennan in supporting a constitutional right of access, but qualified that right with the government's right to limit information for reasons of security or confidentiality.[207]

Justice Stevens hailed the ruling as a "watershed case" in holding the right to gather information as constitutionally protected.[208] It was Justice Harry Blackmun who seemed to indicate the High Court was remedying a wrong with the *Richmond* decision: "It is gratifying...to see the Court wash away at least some of the graffiti that marred the prevailing opinions in *Gannett [v. DePasquale]*."[209]

Only one justice truly disagreed with his colleagues on the bench. It was the same justice who threw confusion into *DePasquale* by writing that trials should be closed

---

[205] Ibid., 580-581.

[206] Ibid., 581.

[207] Ibid., 586.

[208] Ibid., 583.

[209] Ibid., 602.

under the Sixth Amendment in addition to pretrial hearings. In a curious but brief dissenting opinion, Justice William Rehnquist wrote that if the prosecution and defense agreed, courts should be closed to the public because no such right of access is spelled out in the Constitution. The dissent was lean on case law citations, and began with a quote from the Gilbert and Sullivan operetta "Iolanthe," something of a first for Supreme Court opinions.[210] Yet his diverging dicta wouldn't be the last.[211]

Within the newsrooms of the daily papers, members of the press seemed to breathe a collective sigh of relief. "Any list of instances in which a judge can now close a trial will be a very limited list," said Harvard Law professor Laurence Tribe, who argued the case on behalf of Richmond Newspapers.[212] Vindicated by the decision, Richmond Newspapers took the Supreme Court ruling and filed a challenge in the Virginia Supreme Court, asking the court to order an evidentiary hearing in the originating murder case to review facts and ensure that all "interested parties" be heard.[213]

The New York Times hailed the decision, making reference to Justice Blackmun's opinion:

Every time the Supreme Court looks back at its 1979 decision allowing a

---

[210] Ibid., 605. In the play, the Lord Chancellor recites: "The Law is the true embodiment of everything that's excellent, It has no kind of fault or flaw, And I, my Lords, embody the Law."

[211] See Justice Rehnquist's verbose dissenting opinion in *Texas v. Johnson*, 491 U.S. 397 (1988), 421.

[212] Stephen Wermiel, "High Court Bars Closing of Trials In Criminal Cases: Public and Press Are Found To Have Right to Attend Under First Amendment," *The Wall Street Journal*, July 3, 1980, 4.

[213] "Richmond Papers Appeal Ruling On Closing of Pretrial Hearings," *UPI* [Richmond, Va.], August 4, 1980.

> courtroom to be closed for pretrial hearings on evidence, it seems to regret it.... More graffiti has now come off, exposing the error of the original decision.[214]

The paper went on to say that the Supreme Court "has reasserted the obvious," but the editors called for more to be done to ensure openness in the future: "The cleanup is well begun, but not yet done."[215] This hints at the court's fractured ruling and lack of singular voice. Journalists were calling for further clarity regarding when a judge could close a trial.

Jack C. Landau, director of the Reporters Committee for Freedom of the Press, said he hoped the case planted an "initial seed" that would grow into a larger constitutional right to access all kinds of government information.[216]

The day after the *Richmond* decision *The New York Times* columnist Anthony Lewis pointed out the importance of the press in modern society:

> We are not in an age, any longer, when the test of the First Amendment is the freedom of the street corner orator. We live in a complex society, with a Government of immense powers that a democratic republic can hope to control only if it is able to learn the facts in some depth and detail. Accountability, the principle at the heart of the American Constitution, more than ever requires information.[217]

Members of the press seemed eager to see the right of access expanded to cover

---

[214] Editorial, "Wiping the Graffiti Off the Courtroom," *The New York Times*, July 3, 1980, A, 18. Editorial, "The Writing on the Courtroom Wall," *The New York Times*, May 28, 1984, A, 22.

[215] Ibid.

[216] Deirdre Carmody, "Court's Ruling on Open Trial: Some Feel It Establishes a Right to Gather News and May Help to Open Government to the Public News Analysis New Ground Broken Big Change in View Initial Seed Planted Media Claim Seen Validated," *The New York Times*, July 10, 1980, B, 20.

[217] Anthony Lewis, "A Right to Be Informed," *The New York Times*, July 3, 1980, A, 19.

other government entities.

Several months later, a federal judge in Los Angeles would illustrate that not every judge was apt to follow the spirit of *Richmond.* In October 1980, U.S. District Judge Terry Hatter announced that he refused to promise that the trial of five reputed organized crime members would be held in public. Hatter lashed out at the suggestion of the Supreme Court in *Richmond* to sequester a jury as an alternate remedy to closing his courtroom. He would not "take people and remove them from their families so the newspapers can sell ads and advertising on television."[218] Hatter said he believed the British system of limiting pretrial information was superior to the U.S. system.[219]

[218] *Associated Press* [Los Angeles, Ca.], October 22, 1980.

[219] Ibid.

CHAPTER V

POST-*RICHMOND* PROGRESS AND DISCUSSION OF ONGOING PROBLEMS AND A POSSIBLE SOLUTION

In the six years following *Richmond* the Supreme Court expanded the right of access to court hearings. In 1982 the High Court struck down a Massachusetts law, stating the press and public had a right to observe the testimony of minor victims in sexual offense cases.[220] The year 1984 saw the Court decide two more key cases, establishing a constitutional right of access for jury selection (voir dire)[221] and, for the first time, a right of access to pretrial hearings, specifically evidentiary suppression hearings.[222] Then in 1986, the Supreme Court built upon its previous 1984 ruling in *Press-Enterprise v. Superior Court of California, Riverside County* by not only adding an access right to preliminary hearings, but also adding stronger language to state there is a qualified right of access to criminal proceedings under the First Amendment.[223]

It is clear the *Richmond* ruling paved the way for the evolution of access theory for courts. Yet, as Judge Alfred T. Goodwin so aptly put it, the "shotgun wedding"

---

[220] *Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 457 U.S. 596 (1982).

[221] *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501 (1984).

[222] *Waller v. Georgia*, 467 U.S. 39 (1984).

[223] *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 478 U.S. 1 (1985), 9. Although this decision was released in 1986, it was published as part of the court's 1985 session. Thus, the citation does not reflect the actual release date.

between the press and the courts continues.[224] Attitudes about press presence in courtrooms appear to remain contentious. Over the years judges and court officials have attempted to be creative in removing the press from courtrooms. In Oklahoma, four out of eight state drug and mental health court judges cited medical privacy laws in closing court hearings, even though state law does not say the hearings should be closed, and federal officials say HIPAA (Health Insurance Portability and Accountability Act) does not apply to the courts.[225] Although the Oklahoma state judge who helped establish the special mental health court system said the specific state law that created the special courts did not require closed hearings, other state judges said they were concerned certain information being discussed in open court could embarrass participants.[226] By citing HIPAA, judges avoid the burden of having to create a formal ruling in which they have to weigh constitutional interests.

In 2007, a North Dakota district judge, presiding over the murder trial of a former corrections officer accused of murdering a 22-year-old woman in her apartment, closed the courtroom several times during the trial so jurors could ask him questions before being dismissed for the day.[227] Traditionally, these events are held before the public.[228]

---

[224] *See* note 56.

[225] "Judges Increasingly Closing Public Access to Courts," *The Associated Press* [Tulsa, Ok.], September 3, 2007.

[226] Ibid.

[227] Dale Wetzel, "Judge Closes Hearing in Gibbs Case, Wonders if Jury Deadlocked," *The Associated Press* [N.D.], July 12, 2007.

[228] See *Richmond.*

Ironically this behavior was noticed by a local television reporter, who was asked by the court to help start a video player for the jury because it appeared no one in the courtroom could operate it. She was then asked to leave.[229]

Even during one of the largest financial scandals in U.S. history, a federal judge was caught holding at least three closed-door hearings with federal prosecutors and defense attorneys representing three former Enron executives, charged with a variety of felony crimes, in 2003.[230] The *Houston Chronicle* had to spend money to hire attorneys to get U.S. District Judge Kenneth Hoyt to unseal transcripts of the hearings. In the transcripts, Hoyt gave his reason for sealing the hearings: "There are matters that do not need to be discussed in public in ways that embarrasses or humiliates the government or the defense and particularly the court."[231] Publicly, Houston Chronicle editor Jeff Cohen responded by stating, "there's no embarrassment exception to the First Amendment."[232] One month later, a panel of 5th U.S. Circuit Court of Appeals judges denied the *Houston Chronicle*'s appeal in a one-page slip opinion that offered no explanation.[233]

Prosecutors at times push the limits of denying access, although the Supreme Court has stated the protection of the judicial process is a defendant's Sixth Amendment

---

[229] Wetzel.

[230] Mark Fitzgerald, "Houson: We Have a Problem," *Editor & Publisher* 136, no. 31, September 8 (2003): 6.

[231] *In Re:Houston Chronicle Publishing Company*, No. 03-20856, Slip Op. (5th Cir. 2003).

[232] Fitzgerald.

[233] *In Re:Houston Chronicle Publishing Company*. A slip opinion is simply a paragraph or sentence stating a court's decision without offering any explanation as to its reasoning.

right. In 1997 the *San Diego Union-Tribune* brought public attention to a federal judge who ordered the press and public to be removed from the courtroom and placed in a room with a closed-circuit audio speaker to protect the identity of a federal confidential informant who was going to testify in a money-laundering case.[234] Court officials did not seem to care that the audio was sometimes inaudible and it was reported that the plug on the sound system was "yanked out several times to avoid mention of the informant's name."[235] The presiding federal judge stated that protecting the informant's identity was more important than public access. These cases raise two key questions: Why are judges so quick to override a constitutionally-protected interest for interests that are not even constitutional? Is it for the sake of protecting prosecution witnesses, or to spare the potential for embarrassment to the officers of the court?

I argue the answer to these questions resides in two issues: 1) Bad precedent between 1979 and 1980, the period between *DePasquale* and *Richmond*; 2) The confusion of six separate opinions in *Richmond*, which left some judges a way to skirt a developing access right and left all judges with a lack of clear guidance. In looking at the *Richmond* opinions one permeating question surfaces: How does a First-Amendment right of access square with a Sixth-Amendment right to a fair trial? Perhaps the missing voice of one justice could shed some light. In his dissenting opinion in *DePasquale*, Justice Lewis Powell created the framework for a legal test for court access. However, his

---

[234] *U.S. v. Ruben Leos-Hermosillo*, No. CR-97-01221 (United States District Court for the Southern District of California 1997).

[235] "Court Closed to Shield Informant," *Editor & Publisher* 130, no. 50, December 13 (1997): 36.

work was left unfinished in *Richmond* due to his recusal, denying what could have been a rallying beacon for his fellow justices to create a clear test for access. In his dissent, Powell begins by noting that imposing prior restraint on what the press reports is not a viable option under the reasoning of *Nebraska Press*.[236] Also, the public has the same level of interest in access to pretrial hearings as they do trials, but under *Houchins,*[237] that right should be qualified. Powell then called for an equal balancing of a First-Amendment right of access against a Sixth-Amendment right to fair trial, and that the defendant must show that pretrial publicity is **likely** to prejudice a jury. Also, the press must object to the motion for closure immediately in order to invoke its interest. The court must then give reasonable time for the press to be heard on the motion. The burden is upon the press to show the court alternative means to apply that would not preclude access to the hearing.[238] The state may join in the motion for closure, but must show possible interference with fair proceedings and preserve confidential information as needed.[239] If a judge decides to close the hearing, the court must satisfy two key elements: 1) The ruling for closure must not be overbroad as to unnecessarily impinge upon the public's access right; 2) The time period of closure to access must expire when the threat of publicity has passed and public access to court transcripts can be restored.[240]

---

[236] *DePasquale*, 398.

[237] *Houchins v. KQED*, 438 U.S. 1 (1978).

[238] *See* note 101 on alternatives outlined in *Sheppard.*

[239] *DePasquale*, 402.

[240] Ibid., 401.

As groundbreaking as *Richmond* was, Powell's framework was overlooked in the six concurring opinions, but resurfaced in the majority opinions of the *Press-Enterprise* cases in 1984 and 1986. This time, the majority of justices embraced a similar framework, with some marked changes. The High Court increased the burden of the defendant to prove prejudice; this time with a "substantial probability" standard instead of a "likely" one.[241] This made it more difficult to justify closing a hearing. The burden was lifted off the public and press to show alternative means, and placed on the presiding judge.[242] Any finding of closure must be narrowly tailored by the court as to avoid unnecessarily impinging upon the public's right of access. For the first time, the public was found to have a qualified right to access pretrial hearings and equal interest in them, almost on level with trials: "Other courts have noted that some pretrial proceedings have no historical counterpart, but, given the importance of the pretrial proceeding to the criminal trial, the traditional right of access should still apply."[243]

However, some elements of Powell's *DePasquale* framework were missing – notably, the right of the press and public to immediately object to a motion for closure and the requirement of the judge to set a time limit on the closure order. The omission of these elements contributes to what has become a patchwork of guidelines issued by the Supreme Court regarding court access. What is needed is a more unified and clear test that judges, and the press, can point to for guidance. By taking elements from Powell's

---

[241] *Press-Enterprise* (1985), 6.

[242] Ibid., 14.

[243] Ibid., 1.

dissenting test in *DePasquale* and merging them with elements from the *Press-Enterprise* rulings, a more legitimate constitutional test can be created. Before reaching this unified test, some contemporary issues of court access exemplify the need for such a test.

Much like in the case of *Sheppard*, at times a court case can be the focus of national, and sometimes international, media attention. These cases prove particularly difficult to manage given the number of interested parties. Courtroom parking lots and seats can easily be filled by satellite trucks and reporters.[244] A Los Angeles court commissioner found it easier to hold a quick closed-door custody hearing with attorneys for pop star Britney Spears rather than deal with the presence of the press.[245] By the time the press finds out about the hearing and then takes steps to object, the hearing may have been days, or weeks, past. A new solution by some court officials is to charge the press for the inconvenience of accommodating them. During the child molestation trial of pop legend Michael Jackson, court officials billed attending media outlets about $7,500 a day (15 percent of operating costs) as an "impact fee" for additional security staffing, a closed-circuit viewing room, and garbage pickup.[246] Although several media organizations went along with the decision and paid the bill, court officials said access to

---

[244] As a college intern for ABC News, this author witnessed a "media circus" environment while helping to cover the trial of Lorena Bobbitt, who was accused of emasculating her husband with a knife. Court officials struggled with the sheer number of spectators in addition to providing security for the building. A certain number of press were allowed in the courtroom during the trial, while late-comers were housed in an adjacent building with closed-circuit video provided.

[245] Linda Deutsch, "Lawyers Huddle Behind Closed Court Door in Spears Custody Case," *The Associated Press* [Los Angeles, Ca.], February 4, 2008.

[246] Corey Pein, "Celebrity Justice," *Columbia Journalism Review*, November/December (2004): 23.

the trial was unrelated to those who paid. However, some reporters, including one from *The Washington Post*, noted that it was common knowledge that those who paid got in-courtroom seating.[247] The previous example is particularly troubling because it moves dangerously close to unconstitutional pay-for-access behavior. This violates the premise many Supreme Court justices have established: that the courtroom should be considered a "public place" much like parks and sidewalks.[248]

The act of requiring press organizations to purchase coverage of high-profile trials is troubling. Equally so, the expense for the press to hire attorneys each time a judge, or attorney, moves to close a hearing is wholly unacceptable. It violates the very spirit of the Constitution and the concept of public participation and access to government. Right-to-know scholar Herbert Foerstel argued that the Supreme Court needs to go one step beyond a qualified right to making the right of access to courts, and government, an affirmative right.[249] This means government should go beyond reacting when a citizen asserts the right of access, but to move on its own accord in anticipation of public access. Even legal scholar Lillian BeVier, who was skeptical about the Supreme Court finding a constitutional right of access, acknowledged that there is affirmative value in an informed public.[250] Many other legal scholars have also called for a clear balancing test for court

---

[247] Ibid.

[248] In writing about the tradition of open trials in *Richmond*, Justices Burger (p. 571, 578), White (p. 581, Note 18), Brennan (p. 587, 589), and Stewart (p. 599) all mention the history of the courtroom being an open space accessible by the public.

[249] *See* note 26.

[250] BeVier (note 29), 493.

access, citing confusion in *Richmond* that resulting rulings have not fully remedied.[251] As discussed earlier in this section, I propose a unified balancing test, taking elements from both *Press-Enterprise* decisions and adding lost elements from Justice Powell's dissent in *DePasquale*. Thus, the Court Access Test has six prongs. A judge considering closure must meet all six prongs to constitutionally prevent the public/press from attending:

1. The right of the public to attend court hearings, whether pretrial, trial or post-trial, is an affirmative right, unless proven otherwise by clear findings of fact and conclusions of law.
2. A judge must demonstrate that a movant seeking closure has shown a substantial probability that publicity of the hearing would result in prejudicial harm.
3. Any attending member of the public has the right to immediately object to a motion for closure, and has a right be heard.
4. A judge must demonstrate that alternative means to closing a hearing have been considered.
5. Any finding of warranted closure must be narrowly tailored in scope.
6. Any closure order must also be narrowly tailored to be imposed only within the time frame in which the threat of harm exists.

Prong One

As mentioned, some legal scholars see value in considering *the right of access as an affirmative right*. A legal definition of affirmative is something that requires effort; it is a duty to take a positive step to do something.[252] The Supreme Court has designated affirmative rights in the past, such as the right to vote. While the Constitution does not specifically state that a black person can vote, neither does it state that a white person

---

[251] *See* Sanford (note 86), Freedman (note 84), Plamondon (note 79), Dyk (note 73), and McLean (note 70).

[252] *Black's Law Dictionary* (St. Paul: Thomson Reuters, 2009), 68 and 580.

can. Voting under the Constitution is an affirmative right with the Fifteenth Amendment serving as the immediate source of that right.[253] Similarly, it can be assumed that a minority student has an affirmative right to an equal education in a public school.[254] In context of a candidate for office, a District of Columbia federal appellate court found that a candidate had an affirmative right of access to air time at a television station in order to communicate with voters.[255] Even in the groundbreaking case of *Gideon v. Wainright* the Supreme Court noted that a defendant's right in a felony case to legal counsel is an affirmative right, meaning the court should anticipate that such a defendant would need an attorney to help in legal defense.[256] This is not to say that an affirmative right is absolute, or inflexible. It should not be confused with a negative right, where no other options are available.[257]

Foerstel noted that the Supreme Court had yet to establish a right of access as an affirmative right, but argued for its necessity and legal soundness.[258] His argument was

---

[253] *Ex Parte Yarbrough, Petitioner*, 110 U.S. 651 (1884).

[254] *Sheff v. O'Neill*, 238 Conn. 1 [678 A.2d 1267] (1996), 28.

[255] *CBS v. FCC*, 629 F. 2d 1 (1980), 10.

[256] 372 U.S. 335 (1963).

[257] *Yniguez, et al. v. Arizonans for Official English, et al. v. State of Arizona, et al. v. State of Arizona, et al.* 69 F. 3d 920 (1995). In a legal challenge to Arizona legislation, which required all government communication to be conducted in English, the court distinguished an affirmative right with a negative right, clarifying that plaintiff was not seeking to provide all information in multiple languages, but rather that government workers should not be precluded from communicating in languages other than English, in violation of the First Amendment.

[258] *See* note 26.

grounded in the claims of Emerson and Meiklejohn, who argued that an informed populace is crucial for its participation in its government, and that a right to gather and access information is a constitutional right.[259] The Supreme Court has already established explicit constitutional protection of a citizen's right to receive information.[260] It has also at least recognized the importance of news gathering in accessing the government.[261] In these cases, the Supreme Court applied the language of the First Amendment against the government's abridgment of freedom of speech or of the press as an affirming right. Similarly, the right of access should likewise be afforded this protection. If the Supreme Court has adopted the positions of Emerson and Meiklejohn, that access is intimately tied to speech, then legal logic serves that it deserves that same level of protection.

Likewise, as with speech, this does not mean it is an absolute right. Like speech, there are exceptions found in the law. What an affirmative right does for court access is it provides clear language that court hearings are open to the public and that judges and officers of the court should act toward that assumption. It also sends a clear message to court administrators that court rules and policies should conform to this affirmative right. This also prevents establishing bad behavior, in which members of the press find themselves the lone soldier in a daily fight to keep open the thousands of hearings that take place in this country each day. Some courts have already upheld as constitutional

---

[259] *See* note 3.

[260] *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

[261] See *Branzburg v. Hayes*, 480 U.S. 665 (1972); *Houchins v. KQED*, 438 U.S. 1 (1978); *Saxbe v. Washington Post*, 417 U.S. 834 (1974); and *Pell v. Procunier*, 417 U.S. 817 (1974).

similar affirmative language in state statutes. Arkansas and Missouri statutes both offer good examples, stating: "The sitting(s) of every court shall be public, and every person may freely attend the same."[262]

Prong Two

The second prong of this test is that *any movant seeking closure must meet a specific burden of proof*. Specifically, a judge must find that *a substantial probability of pretrial publicity would result in prejudicial harm*. This is outlined in Justice Brennan's concurring opinion in *Nebraska Press v. Stuart*, in which the high standard of proof was necessary to protect what he saw as a the drastic remedy of closure.[263] This standard surfaced again in both the first and second *Press-Enterprise* rulings, in which the justices rejected the California Supreme Court's lesser standard of "reasonable likelihood" for "substantial probability."[264] A defendant, or even the prosecution, must show adequate reasoning and factual showing, under the substantial probability standard, that publicity would have a direct negative effect, and that closure would safeguard the chance for a fair trial.[265] The probability of this prejudice must go beyond being likely, but that the probability of this happening must be substantial. In addition to the Supreme Court's

---

[262] *See Arkansas Supreme Court Writ of Mandamus*, Case No. 78-34 (1979) and *Missouri v. Lohmar*, 5 Med. L. Rptr. 2156 [Case No. CV179-4169CC] (1979). Both state supreme courts have struck down challenge to this language.

[263] *Nebraska Press*, 572.

[264] *Press-Enterprise* (1986), 14.

[265] *U.S. v. Dean*, 5 Med. L. Rptr. 2595 [U.S. District Court Southern District of Georgia] (1980). *New York v. Jones*, 5 Med. L. Rptr. 1262 [New York Court of Appeals] (1979).

adoption of this standard, other appellate-level courts have confirmed this level of burden on the defendant as appropriate.[266] Requiring detailed legal reasoning also protects the integrity of the court and eliminates the chance that the closure could be brought up on appeal.[267] While it may appear obvious that this burden is intended to respond to the public's constitutional access right, this prong also protects a defendant's Sixth-Amendment right to public proceedings. The fact that the defense, or prosecution for that matter, makes a motion for closure, does not mean the court should accept it on its face. A careful reading and consideration of the argument must take place in order to protect a defendant's Sixth-Amendment rights just as much as the public's First-Amendment right. The Supreme Court has already noted in *Richmond* that defense and prosecution agreement on closure is not sufficient reason to grant it.[268] There are more than two parties to a case, the public must be considered, which brings us to the third prong of this test.

Prong Three

Any attending member of the public should have a right to immediately object to a motion for closure and have a right to be heard. This was part of Justice Powell's test

---

[266] *Gannett Pacific v. Richardson*, 3 Med. L. Rptr. 2575 [Hawaii SupCt., case No. 6946] (1978). *Motion*, 5 Med. L. Rptr. 1628 [Connecticut SupCt., case No. 42509] (1979). *U.S. v. Powers*, 6 Med. L. Rptr. 2232 [8 USCA] (1980).

[267] *Oliver v. Postel*, 1 Med. L. Rptr. 2399 [331 N.Y.S. 2d 407] (1972). In this case, a judge's trial closure order was found unconstitutional because the judge made no showing in his ruling that the defendant could obtain a fair trial under the Sixth Amendment if the trial were closed.

[268] *Richmond*, 557.

framework in *DePasquale*,[269] but it was also adopted by Justice Brennan in his concurring opinion in *Nebraska Press*, when he stated the press "has a right to be notified and accorded the right to be heard."[270] Several state supreme courts, such as Arkansas, Georgia, and Michigan, have established the public's right to be heard.[271] The 3rd Circuit U.S. Court of Appeals went as far as requiring judges to post advance notice of a motion of closure on the court docket for the public to see before ruling.[272] While the spirit of the 3rd Circuit judges in giving the public a chance to object to closure is admirable, the preservation of a defendant's Sixth-Amendment right to a speedy trial must also be preserved. The requirement of an immediate objection by a member of the public is important in preserving this right, while affording the public its standing to be a party to a closure motion. It should also be pointed out that defendants can run the risk of waiving their speedy trial right if they do not immediately object to a prosecution's, or judge's, move to close a hearing.[273] The right to be heard, however, does not necessarily imply that a member of the public must be prepared to begin citing legal case law off the cuff. Such an expectation would be unrealistic at best. The right to immediately object

---

[269] *DePasquale*, 401.

[270] *Nebraska Press*, 608.

[271] *Phoenix Newspapers Inc. v. Hon. Renz D. Jennings*, 1 Med. L. Rptr. 2404 [490 P. 2d 563] (1971). *Commercial Printing v. Lee*, 2 Med. L. Rptr. 2352 [Arkansas SupCt., case No. 77-65] (1977). *WXIA-TV v. Devier*, 5 Med. L. Rptr. 2454 [Connecticut SupCt.] (1980). *Detroit Free Press v. Macomb Circuit Judge*, 4 Med. L. Rptr. 2180 [Michigan SupCt., case No. 60470] (1979).

[272] *U.S. v. Criden*, 8 Med. L. Rptr. 1297 [80 F. 2d 2309 (3rd Cir. 1982)] (1982).

[273] *Martineau v. Helgemoeg*, 3 Med. L. Rptr. 1597 [New Hampshire SupCrt., case No. 7484] (1977).

preserves the *public's* legal interest, while preserving the *defendant's* speedy trial interest. Some attorneys may argue that holding a closure hearing itself delays a defendant's right to a speedy trial. My response has two points. First, if the right of access is made an affirmative right, counsel should already be on notice to expect an objection to be raised to closure. Second, the trial judge under this test is already expected to consider the motion and submit findings of fact and conclusions of law on said motion. The time to consider a public or press argument is minimal at best.[274] In addition to considering a motion, a judge should also be expected to consider alternatives to closing a courtroom, which leads us to the fourth prong of the test.

Prong Four

The fourth prong states that *a judge must demonstrate that alternative means to closure have been considered*. This prong stems from the alternatives stipulated in *Sheppard*,[275] and repeated by the Supreme Court in *Branzburg*[276] and the *Press-Enterprise*[277] decisions. This may include, but are not limited to, sequestering a jury from media access, issuing an order to officers of the court to avoid making outside public comments about the case, and instructing jurors to disregard outside information about

[274] *See*, e.g., Carrie Switzer, "Judge Denies Motion to Close DUI Hearing," *Deseret News*, December 9, 2004. A consortium of Utah press outlets filed objection to a county prosecutor's motion to close the preliminary hearing of a man accused of killing three people while driving drunk. The judge allowed the media attorney to appear by telephone for expediency.

[275] *Sheppard*, 360-363.

[276] See Justice Powell's concurring opinion in *Branzburg*, 709-710.

[277] See Justice Blackmun's concurring opinion in *Press-Enterprise* (1984), 513.

the case and only consider the evidence presented during trial. Courts have also been known to instruct counsel to submit sensitive material in the form of written briefs and review that material privately in chambers.[278] Courts have made it very clear that a judge must create adequate findings of fact in considering alternative solutions before ordering a pretrial, trial, or post-trial hearing closed.[279] The courts have supported an affirmative duty upon judges to consider alternatives to closure, and that their reasoning must be shared with counsel and the public. This prevents court hearings from being needlessly closed and encourages courts to participate in balancing constitutional interests.

Prong Five

The fifth prong raises the issue of narrowness. It sates that *a judge's order of closure must be narrowly tailored* as to avoid unnecessary impingement upon the public's right of access. Over the years the Supreme Court and lower courts have settled and re-affirmed the importance of a judicial ruling being precise enough to deal with the constitutional concern, but adequately narrow in order to avoid unnecessarily impinging upon other constitutional rights. In *Globe Newspaper Co.*, and both *Press-Enterprise* decisions, the Supreme Court affirmed that any decision for closure must show "a

---

[278] *U.S. v. The Progressive*, 5 Med. L. Rptr. 1625 [467 F.Supp. 990] (1979). The 7th U.S. Circuit Court of Appeals denied the government's motion to close oral arguments in seeking to prevent a magazine from publishing details about the atom bomb. Instead, the court sought alternative means by reviewing the sensitive information in chambers (*in camera*) before the hearing.

[279] *U.S. v. ex rel. Pulitzer Publishing*, 6 Med. L. Rptr. 2232 [635 F. 2d 676] (1980). *U.S. v. Edwards*, 7 Med. L. Rptr. 1324 [430 A. 2d 1321] (1981).

compelling governmental interest, and is narrowly tailored to serve that interest."[280] While some restrictions of information can be warranted under reasoned legal findings of potential prejudice, the court must consider measures limited in scope just short of closing a hearing.[281] Also, a hearing closure need not be absolute. A judge must consider whether closure should be limited to only those portions of a hearing that might be prejudicial, while leaving the rest of the hearing open to the public.[282] By keeping a closure ruling sufficiently narrow, a judge is showing respect and acknowledgment of the public's right to be present under the Constitution and case precedent.

Prong Six

While narrowness in scope is important, *narrowness in the time span in which a closure order is expected to endure* is also essential. The sixth, and last, prong deals with how long a closure order should be in effect. In *Nebraska Press*, Justice Blackmun wrote that each passing day of an order of prior restraint by a judge is "an irreparable infringement on First-Amendment values."[283] While the court dealt with prior restraint in *Nebraska Press*, Blackmun's passage demonstrates that the time span of a ruling

---

[280] *See* note 52, *Globe Newspaper Co.*, p. 606-607. *Press-Enterprise* (1984), 510.

[281] *Globe Newspaper Co.*, p. 607. *Herald Association v. Ellison*, 6 Med. L. Rptr. 1638 [Vermont SupCt., case No. 34-80] (1980). *Doe v. Risher*, 2 Med. L. Rptr. 1300 [District of Columbia SupCrt., case No. 10997-76] (1976).

[282] *Capital Newspapers v. Brown*, 6 Med. L. Rptr. 1494 [New York SupCt., case No. 37118] (1980). *New York v. Crimmins*, 7 Med. L. Rptr. 1256 [New York SupCt., case No. 3975] (1981).

[283] *Nebraska Press*, 580.

restricting access was an issue that concerned him. In the majority opinion in *Press-Enterprise* (1984), the justices noted that a subsequent denial to access transcripts of a voir dire hearing after a closure order, to protect privacy interests of prospective jurors and possible embarrassment, was not sufficient cause to have "prolonged" closure to keep the voir dire transcripts sealed.[284] While a closed hearing may take place under clear legal reasoning and constitutional consideration, the Supreme Court has maintained that such an order limiting access must eventually expire once the threat of prejudicial harm has passed. Lower courts have also supported this time limit by finding that any limit on court access must be temporary and that hearing transcripts must be made available to the public within a reasonable amount of time, when the danger of prejudice has dissipated.[285] In any order for closure, the time span in which the order is to take place must be considered. Once the threat of prejudicial harm has passed, the court must release transcripts of the hearing to the public. This prong prevents closure orders from becoming open ended, where an order prevents information about a case or trial from ever becoming available for no just cause.

Summary

By unifying elements from well-established Supreme Court and, state and federal appellate case law, this Court Access Test would eliminate some of the problems we have

---

[284] *Press-Enterprise* (1984), 510.

[285] *U.S. v. Edwards*, 14 Med. L. Rptr. 1399 [5 USCA] (1986). *Miami Herald v. Lewis*, 8 Med. L. Rptr. 228 [Florida SupCt., case No. 59-392] (1982). *Detroit Free Press v. Recorder's Court Judge*, 6 Med. L. Rptr. 1586 [Michigan SupCrt.] (1980).

seen in recent closure cases. Requiring a more strict standard in which attorneys and judges must report their legal rationale behind their motions and orders for closure eliminates the temptation for last-minute, bench rulings in which the public cannot participate. By making the right of public access an affirmative right, judges are reminded of our justice system's long history of openness, and the integral part public participation plays in maintaining its legitimacy.

Over the years, justices of the U.S. Supreme Court have made it clear that the press and public have a place as spectators within our courts. It is no longer just tradition, but a part of how our system of justice works. In more modern times, justices have paid special attention to the role journalists play as representatives to the public. Most citizens do not have the time to attend court proceedings, but that does not mean there is not a need to inform the public of what goes on in the courts, as a public space. In this study, we have seen the inclinations of some judges revealed when they have perceived a green light by the Supreme Court to go ahead and slam courtroom doors shut, such as after *DePasquale* was handed down. It is convenient and less troublesome not having outside parties scrutinizing the process, but it is this scrutiny that preserves the integrity of justice, just as in any aspect of democratic governance.

The Supreme Court has established the public's place in the courtroom. A unified legal test will ensure that right of access. Justice flows from public participation. Public observation legitimizes a defendant's right to a fair and public trial, and guarantees that burdens of proof are met, that legal tests are adhered to, and that rules of procedure are followed. Without public participation, our system of justice becomes a mysterious black

box of which citizens will grow ever more wary.

Judges can ill afford to view the press and public as strangers in their courtroom.

CHAPTER VI

CONCLUSION

In the latter part of the twentieth century the U.S. Supreme Court began to embrace what some of our country's greatest legal scholars had come to realize: a free and open government needs a constitutional right to free speech, but its citizens should also have a constitutional right to know what their government is doing. Uninformed speech, it was realized, has no value and does little to ensure that citizens have the ability to participate in their own governance.

This evolution in legal thinking came into play in the courts when, for the first time in U.S. history, the Supreme Court found a constitutional right of the public and the press to access criminal trial hearings in *Richmond Newspapers v. Virginia*. But before this groundbreaking case, courts were struggling to determine just how open courtrooms should be to the public. Past criminal trials, such as *Sheppard* and *Murphy*, had resulted in mistrial, and intense press coverage was to blame. A year before *Richmond* the High Court ruled in *Gannett v. DePasquale* that the public had no right of access to pretrial hearings under the Sixth Amendment right to a fair and public trial. Justices noted that right was reserved for the defendant. However, some justices, such as Lewis Powell, indicated that a right to access hearings could come under the First Amendment. Powell, in his dissent in *DePasquale*, created a framework for a legal test for access under the First Amendment, but that test was mostly forgotten because of Powell's recusal in

Richmond. Almost immediately after *DePasquale* judges across the country began removing the press from hearings, including trials. We have seen evidence that it was not long until the justices realized clarification was needed, and soon. In the year between the two cases hundreds of motions were made for court closures. From a historical perspective, this thesis provides a compelling example of what happens when a ruling by the Supreme Court derails in application, and how justices then work to find a graceful way to remedy the problem. It also reveals the sometimes contentious relationship the courts have had with the press, the criticism by judges that members of the press were irresponsible and sensationalistic, and the criticism by the press that the courts were nailing shut courtroom doors. By analyzing the trajectory of U.S. Supreme Court cases dealing with court access, we can see the evolution in the justices' thinking about the public's role in the justice system and the reasons why justices ruled in favor of public access to the courts.

Justices recognized a long, historically proven tradition of open court proceedings in the United States. The public, as witness to proceedings, acts as a form of quality assurance, making sure attorneys and judges are acting in the interest of justice and avoiding the temptation to stray from the constitutional path. They also recognized that, in modern times, people's busy lives precluded them from attending court hearings and that the press acts as surrogate for the public by relaying news of court business to citizens. This thesis serves to inform many key players in several important ways.

Legal research in mass communication aims to accomplish several goals. It can clarify the law through analysis of procedure, precedent and doctrine. It can suggest

changes in the law, or provide a better understanding of how law operates in society and how society shapes law. It can also serve to educate.[286] In this manner, I draw five conclusions from this study.

First, judges should find this study a rich source of information regarding the legal genesis of constitutional court access, as well as hopefully a guidepost to a better, more clear standard to assessing when court closure is appropriate, given well-established Supreme Court precedent. The notion, as is popular among many judges and attorneys, that the interests of the Sixth Amendment and the First Amendment are directly opposed to one another, is dangerously oversimplified. It is wrong to think that holding open court is done at the expense of a defendant. Both Sixth and First amendments hold the common interest in open courts under the defendant's right to public trial and the public's right to attend that trial. Of course there are limited instances when a defendant's right to an impartial jury could come into conflict with an open hearing. Those instances must be given careful consideration under a clear legal test by the court.[287] A defendant's Sixth-Amendment rights must be preserved, because they obviously have the most to personally lose, such as lifetime imprisonment, or worse. Judges should remain aware that the public nature of court proceedings enhances a defendant's rights by guarding against legal malfeasance, and in a foundational perspective, an open justice system hinges on the presence of the public, whether in person, or by proxy of the press.

Second, for journalists who find themselves covering a story in a courtroom, this

---

[286] *See* note 37.

[287] *See Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), for criteria in which the Supreme Court found intense pretrial publicity can justify hearing closure.

work should educate as to what rights have been established by the courts, and give them a clear understanding that their presence in courtrooms is more than just as a guest. Rather, they are an important and integral part of maintaining the integrity of the justice system. Journalists should also realize that their right to observe is balanced against other constitutional rights and is not absolute. Recognizing their important role in justice, journalists should treat their place with according reverence. My hope is to present this research to journalists in conferences and in publications to ensure that more journalists are aware of their legal standing in courtrooms.

Third, communication scholars should find this study contributes to the greater historic and legal narrative of access law, which deserves further exploration. This work exemplifies a specific aspect of the broader right of access to government information. It can be applied to a variety of more specific topics regarding the right of access. The value in exploring a right of access to government information supports the broader goal of many communication scholars in seeking an open flow of information, an open exchange of ideas, and open opportunities to study the form and function of government.

Fourth, it would be valuable to expand the scope of this thesis in the future by exploring the formative history of access theory within the legislative and executive branches of government. A study of the formation of the Freedom of Information Act (FOIA) by Congress, combined with this work, as well as a study of the growth in the use of Presidential Privilege to keep more information from the public, could give a richer understanding of how legal access theory developed in the twentieth century, and continues to develop in the twenty-first century.

Fifth, general citizens should find this work a source of civic inspiration. This piece should buoy confidence that the courts belong to the public and, as such, they are public spaces where citizens can gather and witness justice as a living entity. This information could prove useful to groups who support open courts and government transparency, as well as citizen journalists and bloggers.

While *Richmond* was a landmark case in finding a constitutional right to access the courts, and even though subsequent rulings expanded upon the decision, *Richmond's* fractured six-part concurring decisions, with no clear majority opinion, caused some confusion. The uncertainty in the language of rulings, and the lack of a clear legal test for access, has allowed judges to end-run the Supreme Court's findings of a constitutional right of access. The elements of a test have rested for years in pieces strewn throughout many High Court decisions. This thesis does not repose at laying out the problems with court access, but aims to find a clear and legally sound solution to the problem. By unifying the elements lost in Powell's dissenting opinion in *DePasquale* with the more current test in *Press-Enterprise*, a stronger standard can be established through a six-part unified test for court access. This test not only draws upon strong case law but also rests on the strong foundation of the legal philosophy of access: that access to information is the coin-side complement to freedom of speech, both are rooted in the First Amendment. Without an informed public, speech becomes worthless. It is important that judges receive clear legal guidance on court access. Such guidance, the very purpose of legal tests, ensures sound legal decisions regarding court closures by declaring the proper

weighing of constitutional interests. It is also important for courts to realize that public observation plays an integral role in preserving the integrity of our system of justice.

BIBLIOGRAPHY

Court Cases

Ex Parte Yarbrough, Petitioner, 110 U.S. 651 (1884).

Gitlow v. New York, 268 U.S. 652 (1925).

Grosjean v. American Press Co., 297 U.S. 233 (1936).

Offutt v. United *States*, 348 U.S. 11, 14 (1954).

Ohio Supreme Court, 165 Ohio St. 293, 135 N.E. 2d (1956).

Irvin v. Dowd, 381 U.S. 532 (1961).

Lamont v. Postmaster General, 381 U.S. 301 (1965).

Estes v. Texas, 381 U.S. 532 (1965).

Sheppard v. Maxwell, Warden, 384 U.S. 333 (1966).

New York Times v. U.S., 403 U.S. 713 (1971).

Phoenix Newspapers Inc. v. Hon. Renz D. Jennings, 1 Med. L. Rptr. 2404 [490 P. 2d 563] (1971).

Branzburg v. Hayes, 408 U.S. 665 (1972).

Oliver v. Postel, 1 Med. L. Rptr. 2399 [331 N.Y.S. 2d 407] (1972).

Pell v. Procunier, 417 U.S. 817 (1974).

Saxbe v. Washington Post Co., 417 U.S. 843 (1974).

Murphy v. Florida, 421 U.S. 794 (1975).

Nebraska Press Association v. Stuart, 427 U.S. 539 (1976).

Doe v. Risher, 2 Med. L. Rptr. 1300 [District of Columbia SupCrt., case No. 10997-76] (1976).

Martineau v. Helgemoeg, 3 Med. L. Rptr. 1597 [New Hampshire SupCrt., case No. 7484] (1977).

Commercial Printing v. Lee, 2 Med. L. Rptr. 2352 [Arkansas SupCt., case No. 77-65] (1977).

Houchins v. KQED, 438 U.S. 1 (1978).

Stevenson v. Commonwealth, 237 S.E. 2d 779 (1978).

Gannett Pacific v. Richardson, 3 Med. L. Rptr. 2575 [Hawaii SupCt., case No. 6946] (1978).

People v. Levine, 55 Ill. Dec. 240 (1978).

Gannett Co. v. DePasquale, 443 U.S. 368 (1979).

Richmond Newspapers v. Commonwealth, 5 Media L. Rep. 1545; Virginia Supreme Court record no. 781598 (1979).

584 S.W. 2d 765 (1979).

Rapid City Journal v. The Circuit Court of the Seventh Judicial District, 283 N.W. 2d 563 (1979).

U.S. v. The Progressive, 5 Med. L. Rptr. 1625 [467 F.Supp. 990] (1979).

Arkansas Supreme Court Writ of Mandamus, Case No. 78-34 (1979).

Missouri v. Lohmar, 5 Med. L. Rptr. 2156 [Case No. CV179-4169CC] (1979).

New York v. Jones, 5 Med. L. Rptr. 1262 [New York Court of Appeals] (1979).

Motion, 5 Med. L. Rptr. 1628 [Connecticut SupCt., case No. 42509] (1979).

Detroit Free Press v. Macomb Circuit Judge, 4 Med. L. Rptr. 2180 [Michigan SupCt., case No. 60470] (1979).
Richmond Newspapers, Inc. v. Virginia, 448 *U.S.* 555 (1980).

CBS v. FCC, 629 F. 2d 1 (1980).

U.S. v. Dean, 5 Med. L. Rptr. 2595 [U.S. District Court Southern District of Georgia] (1980).

U.S. v. Powers, 6 Med. L. Rptr. 2232 [8 USCA] (1980).

U.S. v. ex rel. Pulitzer Publishing, 6 Med. L. Rptr. 2232 [635 F. 2d 676] (1980).

WXIA-TV v. Devier, 5 Med. L. Rptr. 2454 [Connecticut SupCt.] (1980).

Capital Newspapers v. Brown, 6 Med. L. Rptr. 1494 [New York SupCt., case No. 37118] (1980).

Detroit Free Press v. Recorder's Court Judge, 6 Med. L. Rptr. 1586 [Michigan SupCrt.] (1980).

Herald Association v. Ellison, 6 Med. L. Rptr. 1638 [Vermont SupCt., case No. 34-80] (1980).

Detroit Free Press v. Recorder's Court Judge, 6 Med. L. Rptr. 1586 [Michigan SupCrt.] (1980).

Chandler v. Florida, 449 U.S. 560 (1981).

U.S. v. Edwards, 7 Med. L. Rptr. 1324 [430 A. 2d 1321] (1981).

New York v. Crimmins, 7 Med. L. Rptr. 1256 [New York SupCt., case No. 3975] (1981).

Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

U.S. v. Criden, 8 Med. L. Rptr. 1297 [80 F. 2d 2309 (3rd Cir. 1982)] (1982).

Miami Herald v. Lewis, 8 Med. L. Rptr. 228 [Florida SupCt., case No. 59-392] (1982).

Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984).

Waller v. Georgia, 467 U.S. 39 (1984).

Press-Enterprise Co. v. Superior Court of California, Riverside County, 478 U.S. 1 (1985).

U.S. v. Edwards, 14 Med. L. Rptr. 1399 [5 USCA] (1986).

Texas v. Johnson, 491 U.S. 397 (1988).

Yniguez, et al. v. Arizonans for Official English, et al. v. State of Arizona, et al. v. State of Arizona, et al. 69 F. 3d 920 (1995).

Sheff v. O'Neill, 238 Conn. 1 [678 A.2d 1267] (1996).

U.S. v. Ruben Leos-Hermosillo, No. CR-97-01221 (United States District Court for the Southern District of California 1997).

Wilson v. Layne, 526 U.S. 603 (1999).

In Re:Houston Chronicle Publishing Company, No. 03-20856, Slip Op. (5th Cir. 2003).

Books

American Newspaper Publishers Association. *Free Press and Fair Trial*. New York, 1967.

American Society of Newspaper Editors. *Problems of Journalism: Proceedings of the American Society of Newspaper Editors, 1976*. Washington, D.C.: Newspapers Under Fire, 1976.

Baker, C. Edwin. *Human Liberty and Freedom of Speech*. New York: Oxford University Press, 1989.

Cooper, Kent. *The Right to Know: An Exposition of the Evils of News Suppression and Propaganda*. New York: Farrar, Strauss and Cudahy, 1956.

Emerson, Thomas Irwin. *Toward a General Theory of the First Amendment*. New York: Random House, 1966.

Foerstel, Herbert N. *Freedom of Information and the Right to Know*. Westport, Conn.: Greenwood Press, 1999.

Freedman, Warren. *Press and Media Access to the Criminal Courtroom*. Westport, Conn.: Greenwood Press, 1988.

Giles, Robert, and Robert W. Snyder, eds. *Covering the Courts: Free Press, Fair Trials & Journalistic Performance*. New Brunswick: Transaction Publishers, 1999.

Gillmor, Donald M. *Free Press and Fair Trial.* Washington D.C.: Public Affairs Press, 1966.

Gillmore, Donald M. and Everette E. Dennis. "Legal Research in Mass Communication." In *Research Methods in Mass Communication*, 2d ed. Englewood Cliffs, N.J.: Prentice

Hall, 1989.

Haiman, Franklyn S. *Freedom of Speech*. Skokie, Ill.: National Textbook Company; and New York: American Civil Liberties Union, 1976.

Huhn, Wilson. *The Five Types of Legal Argument*. Durham, N.C.: Carolina Academic Press, 2008.

Hunt, Gaillard P., ed. *The Writings of James Madison*. New York: G.P. Putnam's Sons, 1910.

Kalven, Harry, and Hans Ziesel. *The American Jury.* Boston: Little, Brown, 1966.

Knappman, Edward. *Government and the Media in Conflict 1970-74.* New York: Facts on File, 1974.

Meiklejohn, Alexander. *Free Speech and Its Relation to Self-Government*. New York: Harper Brothers Publishers, 1948.

Tedford, Thomas, and Dale Herbeck. *Freedom of Speech in the United States*. State College, Penn.: Strata Publishing, 2005.

Mill, John Stuart, Charles W. Elliot, ed. "Of the Liberty of Thought and Discussion." In *On Liberty*. 1869. Reprint, New York: Barnes & Noble, 2004.

Milton, John. *Areopagitica*. London, 1644.

Nord, David Paul, and Harold L. Nelson. "The Logic of Historical Research." In *Research Methods in Mass Communication*. New York: Prentice Hall, 1981.

O'Brien, David M. "The Trials and Tribulations of Courtroom Secrecy and Judicial Craftsmanship: Reflections on Gannett and Richmond Newspapers." In *Censorship, Secrecy, Access, and Obscenity*, Theodore R. Kupferman, ed. Westport, Conn.: Meckler Corp., 1990.

Olson, Keith W. *Watergate: The Presidential Scandal that Shook America*. Lawrence: University of Kansas Press, 2003.

Pember, Don R., and Clay Calvert. *Mass Media Law*. New York: McGraw-Hill, 2010.

Roberts, Burton B., ed. George R. Rodman. "A Judge's View." In *Mass Media Issues: Analysis and Debate*. Chicago: Science Research Associates, 1984.

Smith, Mary Ann Yodelis. "The Method of History." In *Research Methods in Mass*

Communication, 2d ed. Englewood Cliffs, N.J.: Prentice Hall, 1989.

Startt, James D., and Wm. David Sloan. *Historical Methods in Mass Communication*. Newport, Ala.: Vision Press, 2003.

The Reporters Committee on Freedom of the Press. *Court Watch Summary*. Washington D.C.: November 18, 1980.

Journals

BeVier, Lillian R. "An Informed Public, an Informing Press: The Search for a Constitutional Principle," *California Law Review* 68, no. 3 (May, 1980).

Burrows, Karen B. "First Amendment – The Right of Access to Criminal Trials Extended," *The Journal of Criminal Law & Criminology* 73, no. 4 (1983): 1388.

Chang, Hosoon "The News Media's Right of Access to Pretrial Discovery Materials in Civil Lawsuits," *Journalism Quarterly* 71, no. 1 (1994): 145.

Chu, Howard W. "Is Richmond Newspapers in Peril after 9/11?" *Ohio State Law Journal* 64 (2003): 1655.

Cohen, Anne Elizabeth. "Access to Pretrial Documents under the First Amendment," *Columbia Law Review* 84, no. 7 (November 1984): 1813.

"Court Closed to Shield Informant," *Editor & Publisher* 130, no. 50, December 13 (1997): 36.

Denniston, Lyle. "Right of Access: the Birth of a Concept," *California Law Review* (November 1982): 47.

Dyk, Timothy B. "Newsgathering, Press Access and the First Amendment," *Stanford Law Review* 44, no. 5 (May 1992): 927.

Edwards, Dale L. "If It Walks, Talks and Squawks Like a Trial, Should It Be Covered Like One? The Right of the Press to Cover INS Deportation Hearings," *Communication Law & Policy* 10 (2005): 217.

Emerson, Thomas Irwin. "Colonial Intentions and Current Realities of the First Amendment." *University of Pennsylvania Law Review*, vol. 125, 737 (1977).

Fitzgerald, Mark. "Houston: We Have a Problem," *Editor & Publisher* 136, no. 31,

September 8 (2003): 6.

Goodwin, Alfred T. "Press-Court Relations: Can They Be Improved?" *Hastings Constitutional Law Quarterly*, (1979-1980): 633.

Hayes, Michael J. "What Ever Happened to 'The Right to Know'?: Access to Government-Controlled Information since Richmond Newspapers," *Virginia Law Review* 73, no. 6 (September 1987).

Leeper, Roy V. "Richmond Newspapers, Inc. v. Virginia and the Emerging Right of Access," *Journalism Quarterly* 6, no. 3 (1984): 615.

Lewis, Anthony. "A Public Right to Know About Public Institutions: The First Amendment as Sword," *The Supreme Court Review* (1980): 25.

McLean, Deckel. "The Impact of *Richmond Newspapers*," *Journalism Quarterly* (1984): 786.

Metzgar, Emily. "Neither Seen Nor Heard: Media in America's Juvenile Courts," *Communication Law & Policy* 12 (2007): 177.

Miller, Arthur R. "Confidentiality, Protective Orders, and Public Access to the Courts," *Harvard Law Review* 105, no. 2 (December 1991): 427.

Olson, Kathleen. "Courtroom Access after 9/11: A Pathological Perspective," *Communication Law & Policy* 7 (2002): 461.

Pein, Corey. "Celebrity Justice," *Columbia Journalism Review*, November/December (2004): 23.

Plamondon, Ann L. "Recent Developments in Law of Access," *Journalism Quarterly* 63, no. 1 (1986): 61.

Swift, Susan Freya. "Gannett Co. v. DePasquale: A Judicial Aberration," *Communication/Entertainment Law Journal* 3, no. 2 (1980-1981): 273.

Thomas Irwin Emerson. "The First Amendment and the Right to Know – Legal Foundations of the Right to Know," *Washington Law Quarterly* 1973, no. 1 (1976).

Newspapers

Associated Press [Hillsboro, Ill.], September 13, 1979, Domestic News.

Associated Press [Los Angeles, Ca.], October 22, 1980.

Carmody, Deirdre. "Court's Ruling on Open Trial: Some Feel It Establishes a Right to Gather News and May Help to Open Government to the Public News Analysis New Ground Broken Big Change in View Initial Seed Planted Media Claim Seen Validated." *The New York Times*, July 10, 1980, B, 20.

Carmody, Deirdre. "Newspapers Debating Effect of Court Rulings On Their Operations: Newspapers Debate Rulings' Effect Upon Operations 'A Dampening Effect' A Never-Ending Battle Ordered Not to Write Nuisance Lawsuits." *The New York Times*, April 7, 1980, A, 1.

Cony, Ed. "The Growth of Secret Trials." *Wall Street Journal*, December 17, 1979, 24.

Deutsch, Linda. "Lawyers Huddle Behind Closed Court Door in Spears Custody Case." *The Associated Press* [Los Angeles, Ca.], February 4, 2008.

Editorial. "The Open Disarray of Closed Justice." *The New York Times*, August 18, 1979, 18.

Editorial. "The Writing on the Courtroom Wall." *The New York Times*, May 28, 1984, A, 22.

Editorial. "Wiping the Graffiti Off the Courtroom." *The New York Times*, July 3, 1980, A, 18.

Evans, Charlotte. "Rising Number of Court Cases Closed to Press." *The New York Times*, October 13, 1979, 21.

Greenhouse, Linda. "Powell Says Court Has No Hostility Toward Press." *The New York Times*, August 14, 1979, A, 13.

Greenhouse, Linda. "Stevens Says Closed Trials May Justify New Laws." *The New York Times*, September 9, 1979, 41.

Greenhouse, Linda. "Stevens Says Closed Trials May Justify New Laws." *The New York Times*, September 9, 1979, 41.

"Judge: Jury Selection in Western Ky. Murder Case to be Closed." *The Associated Press*, February 16, 2008.

"Judge Rules That Killer's Sentencing Hearing Should be Public." *The Associated Press*, March 28, 1980, Domestic News.

"Judges Increasingly Closing Public Access to Courts." *The Associated Press*, September 3, 2007.

Lewis, Anthony. "A Right to Be Informed." *The New York Times*, July 3, 1980, A, 19.

Newhouse, Eric. *Associated Press*, September 26, 1979, Domestic News.

Pienciak, Richard T. *Associated Press*, Sept. 27, 1979, Domestic News.

Press, Aric, with Diane Camper. "Court vs. the Press." *Newsweek,* July 16, 1979.

"Richmond Papers Appeal Ruling On Closing of Pretrial Hearings." *UPI* [Richmond, Va.], August 4, 1980.

Rubin, James H. *Associated Press* [Washington], July 2, 1979.

Saperstein, Saundra. "Judge Shuts Maryland Pretrial Hearing; Controversial Supreme Court Ruling Invoked." *The Washington Post*, July 19, 1979, A, 1.

Switzer, Carrie. "Judge Denies Motion to Close DUI Hearing." *Deseret News*, December 9, 2004.

Wermiel, Stephen. "High Court Bars Closing of Trials In Criminal Cases: Public and Press Are Found To Have Right to Attend Under First Amendment." *The Wall Street Journal*, July 3, 1980, 4.

Wetzel, Dale. "Judge Closes Hearing in Gibbs Case, Wonders if Jury Deadlocked." *The Associated Press*, July 12, 2007.